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# The American Political Science Review

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## KELSEN'S THEORY OF LAW*

HENRY JANZEN
*Hamilton College*

Professor Hans Kelsen is the leading exponent of the "pure" theory of law, which is attracting a great deal of attention abroad[1] but as yet has received scant notice in the United States. His theory marks the culmination of the tendency toward a strictly *legal* theory, represented in the writings of K. F. von Gerber, Paul Laband, and Georg Jellinek. This movement aims to eliminate all purely metaphysical postulates—such as the natural law concepts—from legal theory, as well as to free it from the political tint which it so often manifests. It also endeavors to separate the validity of law from dependence on any personal authority.

This attempt to "depersonalize" law is the last stage of a development that began with the passing of absolutism. At that time, ideas of a "general will" and of popular sovereignty—attended by a demand for "a government of laws and not of men" and by the introduction of the principle of separation of powers—made their appearance, only to be supplanted, more recently, by the concept of the *Rechtsstaat*. The latter concept really grew out of the theory of the "general will" owing to attempts to make that will conceivable as an objective norm, the transition stage being marked by Hegel's exploitation of the idea of the "general will" but without its democratic implications. Subsequently, the conception of the "general will' itself progressively lost ground and the concept of the

* The attention of readers is called to Professor Kelsen's paper, "Centralization and Decentralization," appearing in a volume entitled *Authority and the Individual*, published recently by the Harvard University Press. This Harvard Tercentenary paper, which it was at one time planned to present in this REVIEW, having thus been made easily accessible, it has been deemed best to present here Professor Janzen's analysis of Kelsen's legal thought instead. *Man. ed.*

[1] See bibliography compiled by R. A. Metall and appended to Kelsen's *Reine Rechtslehre; Einleitung in die rechtswissenschaftliche Problematik* (Leipzig and Vienna, 1934).



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*Rechtsstaat* finally was freed from the appendage it had inherited from the past. During the last half of the nineteenth century, the concept reached a stage in its evolution at which it reflected the belief that obedience is owed to an objective jurisdiction and that in obeying law one is obeying law only and not a personal ruler.[2]

The legal theory based on this conception of law encountered difficulties in attempting to reconcile it with sovereignty. Being unable to conceive law except as an expression of a sovereign will, the *Kompetenz-Kompetenz* and auto-limitation schools[3] endowed the personified state with a will. If the exponents of these theories had been consistent, they would have conceived this will as an ideal objectivity or would have discarded it altogether.

But only the contemporary school of legal purists, with which Kelsen is so prominently associated, has gone as far as that. The members of the schools mentioned in the preceding paragraph make an attempt to explain the source of legal obligation in legal terms, alleging that the personified state and its will are purely formal legal concepts. But an examination of their writings makes it obvious that they confuse these concepts with the "substantive" state and its concrete functions, and that the will of the state to them is more than a metaphorical expression for the imperative nature of norms.[4] This inconsistency (namely, the confusion of formal concepts with the concrete functions of the substantive state and the conclusions made possible by this alternation) cannot possibly be an inadvertency, for these theorists must be presumed to

[2] For a discussion of this development, see H. Heller, *Die Souveränität; Ein Beitrag zur Theorie des Staats- und Völkerrechts* (Berlin and Leipzig, 1927), pp. 18–20.

[3] The best known exponent of these theories is Georg Jellinek. In the United States, the most prominent representative of the *Kompetenz-Kompetenz* school is Professor W. W. Willoughby, who has presented to the English-speaking world what he calls the "juristic conception of the state."

[4] See particularly G. Jellinek, *Allgemeine Staatslehre* (3rd ed., Berlin, 1914), pp. 170ff., 465–469; *Die rechtliche Natur der Staatenverträge* (Vienna, 1880), pp. 38–41; *Das System der subjectiven öffentlichen Rechte* (Tübingen, 1905), pp. 2, 17, 125; *Die Lehre von den Staatenverbindungen* (Berlin, 1882), pp. 34, 54–55; W. W. Willoughby, *Fundamental Concepts of Public Law* (New York, 1924), pp. 30–50, 71–79, 118–120.

For criticism of these theories, see H. Kelsen, *Allgemeine Staatslehre* (Berlin, 1925), pp. 7–15; *Das Problem der Souveränität und die Theorie des Völkerrechts* (Tübingen, 1920), pp. 8–30, 43, 184; L. Nelson, *Die Rechtswissenschaft ohne Recht* (Leipzig, 1917); A. Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung* (Tübingen, 1923), pp. 1–2, 33, 37–38. See also below, pp. 211–212.

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possess a knowledge of elementary logic. The explanation should be sought in their nationalistic predisposition.

Kelsen not only tries to free legal theory from this political tint, but he also avoids the methodological error of viewing the state interchangeably from two points of reference. That is why his theory attains inner consistency. He conceives the state as a system of legal norms and affirms a rule of law without the intervention of metajuristic factors. That is to say, he is not concerned with the extrinsic (i.e., non-legal) sources and sanctions of law. These socio-political factors, he points out, belong in the realm of a science of causality and are not relevant to a normative discipline which must deal with norms exclusively. In the Kantian manner, he insists on drawing a line between *Sein* and *Sollen;* and, viewing law as an objective norm (*ein Sollen*), he carefully disassociates it from its empirical sources and sanctions.[5]

A normative science, according to Kelsen, does not regard law as an imperative because it is a command (an empirical expression of a will), but because law ought to be obeyed. To this "oughtness" (*Sollen*) Kelsen does not ascribe the absolute value that attaches to morality. A legal norm, he says, is not a categorical imperative but a hypothetical judgment denoting a specific relationship between a determined fact and a determined consequence. To take criminal law, for example, the connection between delict and punishment is not a natural cause-and-effect relationship but a relationship in the normative sense. It means simply that in the case of non-compliance a coercive act will follow. Thus "oughtness" as the category of law has only one specific meaning, namely, that the fact which determines the legal consequence and the legal consequence attached to it are brought together in a legal norm. This relationship is of a purely formal nature and is adaptable to any empirical legal material, or, in other words, "oughtness" is a relative *a priori* category which enables one to grasp the empirical legal material. But it is not the distinctive characteristic of law, it is only *the most general concept* (*Oberbegriff*). Kelsen, who continues in the positivist

[5] *Allgemeine Staatslehre*, pp. vii–viii, 6–7; *Reine Rechtslehre*, pp. 2–4. See also J. W. Jones, "The 'Pure' Theory of International Law," *British Yearbook of International Law* (1935), p. 19. Mr. Jones says: "The pure theory of law does not assert that law is free from elements of psychological, sociological, and, above all, political importance. What it attempts is to put a purely legal construction upon some of the terms which are fundamental in modern legal science—positive law, the sources of law, the sovereign state."

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tradition, sees the distinctive quality of law in its being a coercive order with an external sanction (i.e., a sanction which does not spring from the subject's inner consciousness).[6]

Kelsen's resolve to maintain the normative character of law is manifest in his differentiation of the act to which a norm attaches a legal consequence and the norm proper. When a "natural" act is designated as a legal process, that, Kelsen says, means nothing more or less than that the validity of a norm is asserted, the content of which is definitely related to the actual occurrence. The constitution of a state is "produced" by the empirical volitional act of the constituent authority, but derives its validity from a preconceived legal norm. That is to say, by juristic hypothesis, the constituent authority is derived from a legal principle or norm. A statute is enacted by a legislature, but it derives its validity from the constitution. In the same manner, the exercise of a judge's will who renders a decision derives its validity from a statute. Thus, whether or not a norm is valid depends on whether or not its maker has jurisdiction. For example, the legislature is competent to enact certain statutes when it is given the necessary jurisdiction by the constitution; and custom becomes law when the constitution makes provision for such a transmutation. The mere historical fact of issuing a statute is not proof of the competence of the legislative organ and does not make law, nor does custom become law without a legal norm to that effect.[7]

In separating the normative sphere from that of actual occurrences, Kelsen does not overlook the fact that legal norms refer to human actions which occur at a certain time and in a certain place. He points out that the content of the norms which the legal theorist supposes to be valid must correspond in a certain measure to actual human behavior. In other words, only those legal norms are supposed to be valid which manifest their effectiveness in a certain minimum of corresponding human actions. However, the normative sphere and that of actual occurrences must not coincide; to regard them as identical amounts to a negation of law, for laws, being rules of conduct, obviously have a meaning only if a difference between the two spheres is possible. And, if the disparity is too great, law cannot be used as a criterion for the evaluation of human conduct. As a matter of fact, positivist legal theory pro-

[6] *Reine Rechtslehre*, pp. 20–38.

[7] *Das Problem der Souveränität*, pp. v–vi; *Reine Rechtslehre*, pp. 2–9.

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ceeds on the basis of the "principle of effectiveness," i.e., it does not affirm the validity of norms which are ineffective.[8]

Nevertheless, in his attempt to explain the imperative character of law in a strictly legal fashion, Kelsen distinguishes between effectiveness and validity. He says first of all that effectiveness is not the decisive factor for the validity of law. Furthermore, he insists that the discipline with which he deals is entitled to be an independent branch of study—distinct from theology, ethics, or the science of politics—and maintains that for that reason, and in order to comply with the methods of formal logic, the obligatory nature of law must be derived from another legal norm, a norm that is original and self-sustaining and not derived from a "higher" though not specifically legal principle. As an independent discipline, it deals with its own specific material—namely, law—viewing it as an independent entity, i.e., one that stands on its own foundation and is not derived from another norm-system.[9]

Although concerned only with positive law, Kelsen knows that he must derive its imperative nature from a norm that is beyond positive law. Since empirical volitional acts can become norms only if compliance with the dictates of the law-giver is enjoined by a norm, the positivist who refuses to view law as a mere instrument of force must presuppose a norm that is not laid down by a legislator.

The introduction of this "initial hypothesis" (the preconceived basic norm) enables Kelsen to preserve the normative character of law. The question as to how empirical volitional acts or custom become law has caused many jurists to stray from the straight and narrow path of pure legal theory and to seek an answer in the fields of ethics, or group-psychology, or even the psychology of hypostatized legal persons. Kelsen avoids these digressions. To him the basic norm is only a thought-content, an assumption beyond which the jurist cannot go without leaving his universe of discourse.

A. Verdross, criticizing this aspect of Kelsen's theory, insists

[8] *Allgemeine Staatslehre*, p. 18. This should satisfy the most exacting of the positivists, and yet, Mr. Stern questions Kelsen's success as a positivist. See C. W. Stern, "Kelsen's Theory of International Law," in this REVIEW, Vol. 30, pp. 736–741.

[9] *Das Problem der Souveränität*, pp. 83–89; *Reine Rechtslehre*, pp. 1–2; *Allgemeine Staatslehre*, pp. 103–106. For a similar view, see Anzilotti, *Corso di diritto internazionale*, p. 40, quoted by A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Vienna and Berlin, 1926), p. 31.

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that the initial hypothesis amounts to a fiction unless it is used only as a starting point from which the jurist's insight will lead him to the conclusion that the basic norm, to have any meaning, must be rooted in the realm of absolute values.[10] But that area lies outside the precise sphere of Kelsen, the positivist and purist. As a purist, he is unable to explain the nature of this norm. Should he attempt such an explanation, it would amount to a definition of the basic norm in the light of a *Weltanschauung*. In that case, the *Weltanschauung* would be the standard by which norms would be tested as to their legality, and, instead of having a theory of law, we would have a theory of what law in the theorist's opinion should be. If it were possible to discern immutable absolute universal principles of justice, an attempt to explain law with reference to them by an omniscient legal philosopher would not be objectionable. But the attempt to develop a general theory of law by men with limited vision and in the light of a *Weltanschauung* shaped by conditions peculiar to a certain locality and to a certain time amounts to an explanation of an institutionalized form in terms of the socio-political forces which form its temporary and localized content. Such a theory is likely to be a rationalization of the *status quo*, and, if widely accepted, would tend to make law inflexible in that it would retard the adaptation of its content to changing social needs. Or, if the legal theorist is dissatisfied with the existing order of things, and defines law in the light of his point of view, intending by that means to direct social and political development toward an end considered desirable by him, no amount of referring to allegedly objective values on his part can change the fact that his theory, instead of being an objective explanation of law, is the instrument of a subjective ideology. Thus we see that in either case legal theory is a mere hand-maiden of politics.

Legal theory of that variety conflicts with Kelsen's conception of the sovereignty of law. For as a means to an end—be it a political, moral, or any other end—law would be a mere subordinate part of a higher order.[11] As we have seen, Kelsen insists that a legal theorist is entitled to view law as an independent entity that serves none but its own inherent purpose. And he uses the term sovereignty merely as a symbol of the independence and separateness of law from religion, morals, and politics. The concept of

[10] *Die Verfassung der Völkerrechtsgemeinschaft*, pp. 2–3, 21–23, 32, 35.
[11] *Das Problem der Souveränität*, pp. 83–86; *Reine Rechtslehre*, pp. 1–2.

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sovereignty is therefore of a purely formal nature. In existential reality, Kelsen says, no source of power or motivating cause can be found which is original and entirely self-sustaining (i.e., one that has no causal connection with another source). Even the most powerful state suffers diverse limitations in its cultural, economic, and political life, to say nothing about legal restraints. Sovereignty is therefore not a sociological phenomenon that can be empirically ascertained.[12]

That a will cannot be sovereign is self-evident to Kelsen. He steers clear of the anthropomorphism in which legal theory has been entangled since the passing of absolutism. Most people seem to be unable to visualize law without a subjective psychical bearer; that is why many legal theorists have attributed characteristics to the personified state which are commonly associated only with real persons. These characteristics, in turn, have made the state conceivable as the bearer of sovereignty.

One of the attributes with which the state has been endowed is a will which is alleged to be the source of all law. The idea that the state has a will is the result of a superficial and faulty analysis of certain phenomena. It is based on the illusion that the interplay of wills which occurs in existential reality and which generates law results in the creation of a psychical unit. To make this unit (i.e., the state) more plausible as the psychical bearer of law, it is personified and invested with a will. The psychic interplay itself, however, does not even offer an adequate explanation of the social unity of the members of the state. There are interests and, therefore, wills which tend to separate as well as those which have a centripetal effect. What is more, such interplay occurs only when people live in association. The basis of association, or the factor that unifies individuals and diverse interest groups, is a system of norms—the state. It cements the group together in that it compounds the conduct of the multitude of individuals inasmuch as it imposes duties on them. As a system of norms regulating conduct, the state is a super-individual entity, to be sure, but only in the normative sense, not in the realm of physical or psychical reality. When there is a concurrence of several wills, an actual coalescence is present only in the act of thinking about it. That is to say, this concurrence does not really produce a transcendental super-individual entity with a will, or even a will alone, that is distinct

[12] *Das Problem der Souveränität*, pp. 7, 9; *Allgemeine Staatslehre*, pp. 102–103.

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from the individual wills which are synthesized, so to speak. In other words, that synthesis of wills which is the essence of the concept of every social structure, as well as that of the state, is merely a thought-content.[13]

Kelsen points out that in the eyes of the jurist a "person" is a personified norm-system; in other words, it is a collective name for the ensemble of legal rights and duties which are attributed to a real person or group of persons. The personified state, therefore, is nothing but a symbol of the unity of norms which give certain rights and duties to the organs of the state. And a person is subject to the will of another only in so far as the subordination is commanded by a norm. Those in authority are commissioned by a norm; and their will is the "will of the state" only because they are commissioned by a norm to express a will which passes for the will of the state. That is to say, one is subject to authority in the sense of being subordinated to a norm. The legal norm, therefore, is the real ruler, and *the state is identical with law, i.e., it is the legal system.* Legal theory is concerned with the government—which is a part of the substantive state—only in so far as power delegated by law is not power in the real sense but competence, and is therefore a part of the legal system.[14]

Criticizing those who distinguish between the internal and the external aspects of sovereignty, Kelsen says that the state is not independent externally because it is superior to other legal entities within its borders. The state is independent only in the sense that it is coördinated to other states. Such coördination obviously implies a superimposed authority which allots to the states their respective spheres of jurisdiction.[15] Therefore, if the word sovereignty is at all useable, it is applicable only to the state's conduct of its internal affairs. "When viewed from within, the sovereignty of the state becomes simply the quality ascribed to municipal law of being the last, highest, underived system, as contrasted with subordinate systems deriving their validity from it, and the expression sovereign state is seen to be a mere pleonasm."[16] Since sovereignty is synonymous with supremacy, and supremacy is a

[13] See H. Kelsen, *Allgemeine Staatslehre*, pp. 7–15; L. T. Hobhouse, *The Metaphysical Theory of the State* (New York and London, 1918), p. 66; N. J. Spykman, *The Social Theory of Georg Simmel* (Chicago, 1925), pp. 51–54.

[14] *Das Problem der Souveränität*, pp. 8–14, 16–18, 20; *Allgemeine Staatslehre*, pp. 106–107.

[15] See below, p. 223.

[16] J. W. Jones, *op. cit.*, p. 9.

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superlative, the state is not really sovereign even internally, although it is superior to the legal entities which it encompasses.[17]

Having defined the state in terms of law, Kelsen considers the problem of the relationship between municipal and international law. He says that the relationship between two norm-systems may either be one of subordination or one of coördination. In the case of the former, the lower order finds the source of its validity—the relatively basic norm for itself—in the superimposed order. In the latter case, there must be, in addition to the coördinated systems, a higher order; for the coördination of two legal systems amounts to a delimitation of their respective jurisdictions, and that simply means that the content of the lower norms is determined by the higher norms. The relationship between the higher norms and the lower norms may be either direct or indirect. That is to say, the higher norms may either determine the procedure by which the lower norms are to be enacted or else may delegate to certain authorities the competence to issue norms which are to be valid in a certain sphere. In both cases the relationship of the higher order to the lower is that of a whole to its parts. And, if the two systems of norms which we designate respectively as international law and municipal law are law, the relationship between them must be one of those described here.[18] A dualistic construction of law, i.e., one that is based on the assumption that international law and municipal law are two systems, distinct as to source and content, is methodologically impossible. Kelsen admits that, in the final analysis, the difference between municipal and international law lies in a difference of "sources," i.e., sources in the sense of social facts. But he also points out that such sources lie outside the scope of legal theory, since a normative discipline concerns itself only with the sources of the imperative nature of law, namely, the basic norms.

The best known exponent of dualism is H. Triepel.[19] According to Triepel, municipal law is the product of the will of the state and international law is created by the merging (*Vereinbarung*) of the wills of the individual states. The expression of this common will of the nations constitutes a law which is binding and which is not subject to change by unilateral action. Triepel readily admits his

[17] *Das Problem der Souveränität*, pp. 38–40; *Allgemeine Staatslehre*, pp. 106–107.
[18] *Reine Rechtslehre*, pp. 136–137.
[19] *Völkerrecht und Landesrecht* (Leipzig, 1899).

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inability to explain the source of the obligatory nature of this law, pointing out that this difficulty is the common lot of all who try to explain the source of obligation in jurisprudence. Granting that this can be done only on the basis of an "initial hypothesis," such an explanation is to be preferred to Triepel's explanation or, to be exact, omission thereof.[20] Triepel's construction gives law a psychological basis, whereas that offered by the pure theory preserves the normative character of law. Supposing a coalescence of the wills of several states does take place, it still remains to be shown how an expression of this common will can be transmuted into a legal norm without presupposing a norm that attaches legal consequences to the factual meeting of wills. This Triepel does not explain. Therefore, to be subject to one of Triepel's laws means nothing more than being confronted by an empirical will. As Mr. J. W. Jones aptly observes,

> The theory which founds the basis of the validity of international law on an aggregate or union of the wills of states had never been able to explain how the empirical description of the origin of the content of rules can provide a legal basis for their obligatory force. States enter into agreements, but the analysis of this fact in terms of psychology leaves unsolved the problem why treaties are binding even after the will to be bound has disappeared.[21]

Even if one were to deduce that "the will of the international community" is the source of the imperative nature of international law from "the reason of the thing," as Mr. Lauterpacht suggests, one would encounter the same difficulties that the social contract philosophers had to face in connection with their doctrine of the "general will," difficulties that they tried to evade by introducing the far-fetched doctrine of "tacit consent." Therefore, the introduction of the "initial hypothesis" by the Austrian school as a solution of the problem of legal obligation seems to be quite an improvement as compared with Triepel's evasion of the question.[22]

Because Triepel conceives international and municipal law as binding norms and not as mere conglomerates of socio-political facts, he cannot take the disparity of the two systems as his point of departure and construe their contemporaneous validity without violating the rule of identity. The monistic construction is required as a matter of methodological consistency.[23] Kelsen argues that if

[20] For a different view, see H. Lauterpacht, *The Function of Law in the International Community* (London, 1933), p. 416.

[21] *Op. cit.*, pp. 18–19.

[22] *Op. cit.*, p. 421.

[23] In view of the contribution of the Austrian school in the field of methodology

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the dualists were right in their contention that the two systems are separate and distinct, it would be impossible for them to view the state and international law as well as two or more states as contemporaneously valid systems of norms. The dualist must be satisfied with viewing his own state as the only valid system of norms and must look upon all other states and international law as phenomena in existential reality, not in the normative sphere. He must exclude them from his universe of discourse for the same reason that he must exclude ethics, for example. At any rate, he cannot designate them as systems of legal norms.[24]

Since it seems unreasonable to deny a normative character to international law as well as to the other state systems, some dualists, according to Kelsen, resort to a fiction in order to establish the legality of the aggregates of norms which are outside of their own state system. They derive their legal nature from the "recognition" which is accorded them by their own state. That means, of course, that international law and the other legal orders become the "external" law of the state which extends the recognition; in other words, they become the norms by which the state unilaterally regulates its relations with other states. Thus, in spite of the dualistic orientation of the exponents of the "recognition" theory, the tendency inherent in juristic cognition inadvertently comes to the fore. Namely, the legal order of the world becomes a unitary system on the basis of the law of the recognizing state. However, whether the dualist admits it or not, his doctrine implies the primacy of the state and thus amounts to a denial of international law, one of the functions of which is the coördination of states.[25]

Referring to the affirmation of the current theory that international law regulates the conduct of *states*,[26] whereas municipal

alone, the statement of Lauterpacht, that "little, if anything, has been added to it [i.e., Triepel's theory] by recent jurists," seems unwarranted. *Ibid.*, p. 416.

[24] *Das Problem der Souveränität*, pp. 94–98, 105–107, 121, 123; *Reine Rechtslehre*, pp. 136–139.

[25] *Reine Rechtslehre*, pp. 139–143.

[26] The assertion that only states as such can be subjects of international legal rights and obligations is another corollary of the personification of the state. In the days when the overlordship of the personal ruler over his domain was regarded as a property right (see for example Hugo Grotius, *De jure belli ac pacis*, tr. by F. W. Kelsey, Oxford, 1925, pp. 113–119, 137), it was quite proper to regard him as a possessor of international legal rights and duties. However, the attempt to present the personified state as the heir of the personal ruler to these rights and duties amounts to an attribution of rights and obligations to an abstraction.

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law regulates relations among individuals and between individuals and the superimposed state, Kelsen points out that this alleged distinctive function of international law and the implied dualism cannot be explained regardless of whether the theorist postulates the primacy of municipal law or the primacy of international law. Supposing, for the sake of argument, that the state "recognizes" the norms of international law as a limitation on its competence. From the standpoint of the jurist, that means—as was pointed out in the preceding paragraph—that the state incorporates international law in its own legal system, or, in other words, that international law becomes the external law of the state. In that case, the law of nations cannot limit the state in any other way than the state's own legal system—of which it has become a part—limits the "state." But the state can limit itself only by prescribing certain lines of conduct to the men whose conduct, by legal fiction, is considered to be the conduct of the state. It follows that international law really regulates the conduct of *men* who are agents of the state and not that of the state itself. In other words, to say that international law imposes obligations and confers authorizations on states simply means that individuals are on the receiving end of the relationship. The situation is analogous to the relationship between municipal law and a subordinate juristic person—a corporation, for example. In both cases, the higher law determines what is to be done and what is not to be done, but the individuals who are to act or to abstain from action are determined by the subordinate legal person, the state and the corporation, respectively. The relationship between individuals and international law is therefore not direct or immediate, with the exception of such laws as the rules of blockade and guerilla warfare which in some of their aspects apply to men who are not agents of the state in the usual sense but private citizens.[27]

[27] *Das Problem der Souveränität*, pp. 126–127, 130–133, 139, 162–165; *Reine Rechtslehre*, pp. 132–134. This argument of the dualists loses all its significance when one considers that in any case law, as viewed by the jurist, regulates only relations among norm-systems. That is to say, although law *actually* regulates relations among men, it is only through the agency of law that relations are brought into being which are relevant to juristic study. In the eyes of the jurist, a "person" is only a collective name for the aggregate of rights and duties that pertain to an individual or group. Every person in the legal sense is therefore a system of norms, and legal relations are relations within a legal order and among legal systems only. *Cf. Das Problem der Souveränität*, pp. 125–127.

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If international law does not regulate the relations with which it is concerned directly, but delegates that function to the state, the two systems must logically be derived from the same source and they must be linked together by legal norms. That is to say, the two systems must be regarded as one. The dualism of municipal and international law would be conceivable, according to Kelsen, if the latter could be regarded as limiting the states as such. But that is obviously impossible without regarding the state as a real person.[28]

There are also those who argue against a monistic construction by pointing out that the separateness of the two systems of law follows from the possibility of irreconcilable conflicts between them. By way of rebuttal, Kelsen points out that the dualist's use of "recognition" as a link between the two systems actually removes this objection to the monistic construction. That is to say, such conflicts are inconceivable when one considers that, in the final analysis, it all goes back to the same "will" and, especially, when one bears in mind that the so-called will of the state is nothing but a metaphorical expression for the imperative nature of norms.[29]

Kelsen also points out that the alleged conflicts of laws are really factual situations and that from the purely logical point of view they are not contradictions. There are analogous situations within the state, and yet no one thinks of denying the unity of the state's legal system. An unconstitutional statute may be regarded as binding, or an administrative act may be *ultra vires*, without destroying that unity. The repugnant lower norm may be annulled by prescribed procedure and the agent exceeding his authority may be held personally responsible in jurisdictions where such acts are punishable offenses. But a delict is not a breach of law in the sense that it interrupts the existence of law; in fact, it confirms the existence of law in that it is the prerequisite condition to the specific reaction of law, namely, the coercive act. Since there is no logical contradiction between a delict and the norm which establishes it, it follows that from the purely logical point of view it is conceivable that an illegal act may lay down a valid norm. Though the issuance of such a norm in some jurisdictions may make the issuer liable to a penalty, the norm may nevertheless be valid until it is abrogated

[28] *Ibid.*, pp. 130, 133.

[29] *Reine Rechtslehre*, p. 144.

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by another legal act, or it may remain valid indefinitely if there is no legal remedy provided for its deficiency.[30]

In a similar manner, a statute may be repugnant to a treaty or to customary international law without affecting the validity of these international legal rules. International law obliges the states to carry out certain measures by attaching certain consequences to non-compliance, namely, its specific sanctions—retortion, reprisals, and war. But this does not preclude the possibility of a statute of a state being at variance with the dictates of international law. And—although some treaties make provision for the solution of such conflicts—as far as general international law is concerned, the situation is similar to that within a state the constitution of which fails to establish a procedure by which unconstitutional statutes may be voided but fixes the responsibility for unauthorized acts on the agencies that act *ultra vires*. That is to say, a government which enacts a statute that is repugnant to international law is guilty of an international delict and is subject to the appropriate penalties.[31]

One need not have a will-to-believe or a desire for "a completely homogeneous and unified theory of law" to be convinced by this argument. And, when Mr. Jones, who apparently is not convinced, insists that "if there is one proposition clearly recognized by both international and municipal law, it is that a rule which is opposed to the former may yet be binding in the latter,"[32] he does not affirm something that Kelsen denies. As was shown above, Kelsen is fully aware of that fact and merely insists that such a discrepancy does not destroy the unity of law.

Continuing his criticism of Kelsen, Mr. Jones says also:

> How is it possible to say that an act contrary to international law is to be attributed to the complex of rules of which the state is the personification and which owe their validity to international law itself? Such a conclusion can only be reached by adopting the hypothesis of the supremacy of municipal law, which, says Kelsen, is as much as to say that international law is not law at all, with the consequence that the act cannot be unlawful . . . The problem of the validity of state legislation contrary to international law only arises if we accept the monistic position for the act of legislation, and the dualistic for the rule when once it is laid down.[33]

Mr. Jones' difficulty seems to spring from the fact that he seeks and fails to find analogies in municipal law, as is indicated by his

[30] *Reine Rechtslehre*, pp. 38, 145.
[31] *Reine Rechtslehre*, pp. 144–147.
[32] J. W. Jones, *op. cit.*, p. 13.
[33] *Ibid.*

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statement that "even in the Common Law it is not yet admitted that a corporation can be held responsible for damage caused by an act which is *ultra vires* of the corporation."[34] To find such analogies, one need not go beyond the laws and judicial decisions in the United States defining the liability of municipal corporations for the torts of agents engaged in so-called proprietary functions. Furthermore, for examples of a contemporaneous existence of two mutually incompatible laws one needs only to examine the constitutional history of federal states. In such states, a lower norm which is repugnant to a higher norm is not *ipso facto* invalid. It has the effect of law for all practical purposes until it is annulled in a prescribed manner by an authorized agency. In other words, a legislative enactment by a government whose competence is limited by a constitution which is enforceable by the courts has the effect of law until it is declared to be repugnant to the higher law and therefore null and void. In some jurisdictions, the courts *must* apply the statute without being competent to exercise the power of judicial review; and administrative agencies generally must carry out statutes regardless of whether or not they are in accord with the constitution. Thus we see that "conflicting rules can and do exist side by side" without destroying the unity of the legal order.

When Mr. Jones insists that international as well as municipal law recognizes "that a rule which is opposed to the former may yet be binding in the latter," he fails to tell the whole story. For a government which is guilty of enacting statutes or decrees in violation of international law may not invoke these statutes or decrees as a defense against claims arising in consequence of its delict. A government, the rights of whose nationals are violated by the government of another state either by a statutory enactment or by a decree, or by its failure to protect them, or by a "denial of justice," has the right to insist on the repeal of the repugnant enactments as well as to determine what procedure to use in pressing the claims arising from a violation of these rights. Some of these rights rest on provisions of treaties, others arise from the generally recognized rule of positive international law according to which foreign nationals are entitled to the same measure of protection from the government of a state as that government affords its own

[34] *Ibid.*, footnote 1.

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citizens.[35] Granting that legislatures do enact statutes which are contrary to treaties and to general international law, and that municipal courts, following the rule *lex posterior derogat priori*, may apply them in preference to the treaties, or in preference to general international law, insisting on "express adoption" of the latter by their own state before they give effect to it, this does not deprive a government, the international legal rights of whose citizens have been violated in this manner, of the right to insist on arbitration or adjudication or to exert pressure on their behalf by all available means, such as diplomacy, reprisals, and war. And the agencies responsible for the conduct of the foreign relations of the refractory state yield to such demands or pressure unless they feel strong enough to stand the consequences of resistance. The available means of self-help in the international forum may not always be effective in solving the conflicts between state action and international law, but this deficiency, as we have seen, does not disprove the formal unity of the international legal system and of the state systems which it encompasses; it merely proves the inadequacy of its implementation and sanctions.

Having determined that formally law is a unity, the problem of primacy remains to be solved. The question is not solved by positing sovereignty in law; it remains to be determined whether municipal or international law has precedence in the legal hierarchy. In relation to this subject, Kelsen takes the view that legal science has a choice between two hypotheses: it may proceed on the assumption that municipal law is supreme, and, again, it may postulate the primacy of international law. From the standpoint of scientific method, both approaches are warrantable, asserts Kelsen, because we are concerned with a problem that cannot be empirically verified. Therefore, one may assume, on the one hand, that a

[35] Cf. E. M. Borchard, *Diplomatic Protection of Citizens Abroad* (New York, 1927), pp. 18, 181–182, 213–230, 330; J. L. Brierly, *The Law of Nations* (Oxford, 1930), pp. 137–141; C. Eagleton, *The Responsibility of States in International Law* (New York, 1928), pp. 12–13, 167–168; J. W. Garner, "Limitations on National Sovereignty in International Law," in this REVIEW, Vol. 19, pp. 8, 14; A. Verdross, *Die Einheit des rechtlichen Weltbildes*, p. 163; *Die Verfassung der Völkerrechtsgemeinschaft*, p. 37; B. H. Williams, *American Diplomacy; Policies and Practice* (New York and London, 1936), pp. 212–228.

There is no such general agreement concerning the legality of the so-called "international standard" invoked on behalf of foreign creditors and investors in the more unstable countries by their home governments in order to insure them preferential treatment and a greater degree of protection than that enjoyed by the natives. See B. H. Williams, *op. cit.*, pp. 212–216.

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norm of international law arranges the relationship between the law of nations and the state. On the other hand, one may assume that the state arranges its relationship to international law by a legal norm which incorporates international law, or at least a part of it, in its own law. Finally, one may assume that the state abstains from linking the rules of the so-called international law to itself, for there is nothing in juristic cognition which makes it imperative to regard as valid norms rules that cannot be included in the category law on the basis of the primacy of municipal law. In other words, the jurist is not compelled to ascribe a legal character to factual phenomena which, according to his point of view, are not legal norms. The material which is designated law is not law *a priori;* it acquires legal character only through the hypothesis by means of which it is interpreted. Whether it is law at all, and what its relationship to other law is, depends on the hypothesis of the observer. The choice of this hypothesis is arbitrary, and in making his choice the observer is influenced by his *Weltanschauung.*[36] Thus, according to Kelsen, the solution of the problem varies according to the point of departure of the jurist, which may be either international law or the state. Kelsen says, in effect, that the political views and attitudes of the legal theorist determine whether municipal law has precedence over international law or *vice versa*, or whether international law is law at all.

Criticizing Kelsen's relativism, Verdross maintains that it is inconsistent with his assertion that only a system of norms which is actually effective is positive law.[37] Verdross contends that if this is the criterion of positive law, the legal theorist does not have the freedom of choice that Kelsen assigns to him, but is compelled to regard as a positive legal order any system of norms that is effective, And, therefore, if it is possible to show that international law meets that qualification, it must be regarded as law. In other words, if the legal theorist whose point of reference is municipal law finds it impossible to include international law in his universe of discourse, he must, according to Verdross, expand his universe of discourse so as to include international law.[38]

It does not follow from Kelsen's statement, as Verdross seems to imply, that all norms which manifest their effectiveness in actual conduct of human beings are law. Kelsen merely states that the

[36] *Das Problem der Souveränität*, p. 103; *Allgemeine Staatslehre*, pp. 128–129.
[37] See above, p. 208. [38] *Die Verfassung der Völkerrechtsgemeinschaft*, p. 17.

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positivist legal theory does not affirm the validity of norms that are ineffective.[39] This does not mean that all effective rules are generic norms and that they must be included in the category law. The dictates of fashion and the rules of morality, for example, are effective; yet it would not occur to anyone to designate them as law. They refer to lines of conduct the regulation of which governments have not seen fit to take upon themselves. One may agree with Verdross when he makes the term law the common denominator for all the norms which are effected by governmental agencies, including the rules governing international intercourse; yet one must admit that these rules and municipal law are sufficiently dissimilar in their secondary characteristics to make a differentiation of the norm-systems seem reasonable. For that reason, and because a definition is arbitrary, there is nothing to prevent a legal theorist from defining law in such terms as to exclude the rules governing international relations.

Having affirmed the freedom of the jurist to choose as his point of reference either international law or municipal law, Kelsen explains why he bases his own theory on the primacy of international law. He has demonstrated the unity of the two systems of norms by a negative argument denying the possibility of a logical contradiction between them. After that, his analysis of the "origin" of the state and of the principle of state equality inevitably leads him to the conclusion that the concept of law is actually as well as formally complete only if the primacy of international law is recognized and if it is conceived as the highest all-encompassing system.

According to the principle of effectiveness—which is not only Kelsen's criterion of positive law, but also a generally recognized principle of positive international law regulating the rise and fall of states and governments—a government is considered to be legitimate if, during a certain length of time, it has demonstrated that it is capable of enforcing its enactments. This means that a community in which a legislative authority has operated effectively for a period of time constitutes a state in the international legal sense, or, what amounts to the same, it is a state by authority of international law.[40] Not only does a state receive its legislative

[39] See above, p. 208.

[40] The idea that states are creatures of international law is by no means new. We find it in the writings of Richard Zouche (1590–1660), for example, who says

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authority from the law of nations by way of delegation, but international law also delimits its temporal and territorial validity through the principle of effectiveness. Thus the origin as well as the termination of states is explained by Kelsen in legal terms in the same way that one explains the formation and dissolution of subordinate juristic persons within the state.[41] As Mr. Jones points out, recognition on the part of other states can therefore have only "declaratory, never constitutive, effect."[42] That international law thus legitimizes revolutionary governments after they have satisfied its requirements, and "gives to the order immanent in the facts . . . the dignity of law,"[43] is not Kelsen's fault, as Mr. Jones seems to imply. For a legal theorist, in referring to concrete situations, cannot by his fiat make law more perfect than it actually is.

The territorial limits of a state also are determined by the principle of effectiveness. These limits coincide with the extent of the effectiveness of the legal order of the state. And international law not only guarantees the integrity of this territory by attaching certain legal consequences (i.e., its sanctions) to acts of encroachment on the part of other states, but, looked at from another angle, it also enjoins the state from undertaking coercive measures beyond its confines, except in special cases. If states are viewed as coercive orders, it is only in this manner that their legally coördinate existence is conceivable. In other words, the principle of state equality, which is generally recognized as a rule of positive law, can have a legal meaning only from the standpoint of the primacy of international law.[44]

According to Kelsen, the state has residual powers. That is to say, its claim to the totality of powers is limited by the specific powers withdrawn, or to be withdrawn, from its competence by the international legal order. In this respect the state differs from other agents of international law, namely, those resting on treaty or convention basis, which have only delegated powers. As an agent of the international legal order, the state participates in the

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that by international law "nations are separated, kingdoms founded, commerce [is] instituted, and lastly wars [are] introduced." *Juris et judicii fecialis, sive, juris inter gentes, et questionum de eodem explicatio*, tr. by J. L. Brierly (Carnegie Institution of Washington, 1911), p. 1.

[41] *Reine Rechtslehre*, p. 148.

[42] *Op. cit.*, p. 14.

[43] *Ibid.*, p. 15.

[44] *Reine Rechtslehre*, pp. 148–149.

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formation and amplification of international law by means of treaties and usage.[45]

Some of the champions of state sovereignty against a superimposed legal order explain customary international law in terms of tacit agreement and derive its binding force by indirection from the treaty-making power of the state. But, says Kelsen, even treaties, i.e., express agreements, are law-producing factors only because there is a norm to that effect. This norm must be part of a higher order, for, considering the legal equality of states and the territorial delimitation of the state's authority, it is plain that one state cannot bind or authorize the citizens of another state. And, since the competence of one state engaged in the conclusion of a treaty with another cannot be added to that of the other—as one might add two mathematical figures—to produce a higher authority competent to enact norms the validity of which would extend over both states, there must be a higher law which makes the creation of such particular international law possible. Theoretically, the creation of particular international law is conceivable only on the basis of a general law of nations.[46]

Among the norms of general international law, the rule *pacta sunt servanda* is very important. It is the norm which attaches legal consequences to the empirical act of concluding an agreement. Without it, treaty-making would not be a law-producing factor, or, in other words, treaties would not be law. It also obliges states to conduct themselves in conformity with the terms of treaties. Since the fundamental law, upon which treaties rest, is one of the norms of general international law, treaties (i.e., particular international law) are on a lower level in the hierarchy of law than the general law of nations.[47]

This general international law imposes obligations and confers authorizations on all states. It came into being through usage; i.e., it was formed by acts of state agencies authorized by their constitutions to conduct foreign relations. But it did not acquire its legal character from usage, says Kelsen; even customary law must rest on a norm which stipulates that usage creates law.[48]

Since the legal nature of treaties is derived from general international law, the representatives of two or more states engaged in concluding a treaty constitute *one* organ, which is primarily an agent of the international legal order and not the common agent

[45] *Ibid.*, p. 150.
[46] *Ibid.*, pp. 150–152.
[47] *Ibid.*, pp. 129–130.
[48] *Ibid.*, p. 129.

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of the two or more states. This is apparent, Kelsen points out, when one bears in mind that it is the general law of nations which authorizes states to designate representatives for the purpose of negotiating treaties. But, obviously, these representatives, who jointly are an agent of the international legal order, severally are also agents of their respective states; thus the states also are organs of international law, with delegated authority to participate with other states in the formation of treaty law.[49]

In this manner, Kelsen establishes the unity of the universal legal order. He hastens to point out, however, that he is by no means speaking of a unified organization of the world in a universal state. He is fully aware of the fact that in reality there is a great deal of disunity. The unity he has demonstrated is a formal (*erkenntnismässige*) unity.[50] Therefore Mr. Stern's statement that "only the future can tell whether or not Kelsen idealized the present international status"[51] misses its mark.

It has also been stated that Kelsen "did not succeed in developing a 'pure' theory of law any more than other philosophers before him," because he was impelled to posit the supremacy of international law by his "internationalist ideology" and not by logical deduction alone.[52] Kelsen does say that the conception of a number of co-existing communities which, in spite of differences in size, population, and power, are equal before the law and which, with their respective jurisdictions delimited, are united in a greater community, is an eminently ethical idea. He hastens to add, however, that it is tenable only when supported by the juristic hypothesis of a superimposed legal order.[53] And in pointing out that the *theoretical* refutation of the dogma of sovereignty is one of the important achievements of the pure theory, he says that it was not undertaken with a political purpose in mind. He admits that it may have political consequences because it removes one of the obstacles that has impeded the growth of international law and a more complete unification of the international legal order—developments that have been opposed by the champions of the dogma of sovereignty as being incompatible with the nature of international law and of the state.[54] The doctrine of sovereignty—a political dogma in the

[49] *Ibid.*, p. 152.
[50] *Ibid.*, p. 153.
[51] C. W. Stern, *op. cit.*, p. 741.
[52] *Ibid.*, pp. 740–741. See also J. W. Jones, *op. cit.*, pp. 11–12.
[53] *Das Problem der Souveränität*, pp. 204–205.
[54] See *Reine Rechtslehre*, p. 153.

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guise of a presumably irrefutable logical argument—insists that sovereignty is an essential element of statehood, thus explaining the contemporary status of a changing institution in terms of an allegedly immutable concept that may or may not have been an appropriate symbol for the facts of an earlier era. If political development is retarded by an "archaic" ideology, it may be expected that the extirpation of the obsolete concept of sovereignty, which is suffused with emotion in the "public mind," will strengthen law-abiding sentiment and accelerate the growth and implementation of law in the international community.

But such developments are neither assumed nor advocated by Kelsen. His theory, as a theory, is indifferent to its possible political consequences. As we have seen, he does not define law in terms of the purposes which it, in his opinion, should serve. Nor does he define it—as is often done—as the product of a particular political institution, and, therefore, he does not make the existence of such an institution in a particular form the essential and unalterable prerequisite or source of law. The fact that he may have had a political purpose back in his mind when he chose his own fundamental hypothesis and rejected several other theoretically possible alternatives, is an entirely different matter. Granting that one might object to Kelsen's choice on empirical grounds, that is not the same as saying that his choice and the motives which determined it affect the inner purity of his theory.

Above all, Kelsen must be credited with having relegated a piece of make-believe—namely, the sovereign will of the personified state—to its proper place among other relics. His theory is significant because it shows that the postulation of sovereignty is not prerequisite to an explanation of law. By founding his theory on preconceived legal norms, he furnishes a formula by means of which he is able to explain the source of legal obligation in legal terms and to preserve the objectivity of law. Not only that, but this formula also makes it possible to conceive international law as law in the proper sense; in other words, it supplies a common denominator for a greater number of generic norms than a theory which posits the will of the sovereign state as the source of all law. In this manner, Kelsen takes the state off the pinnacle of the legal pyramid—a position to which it had been elevated by the doctrine of sovereignty—and consigns it to an intermediate place in the legal hierarchy.

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# THE CONSTITUTIONAL POSITION OF THE *PARTITO NAZIONALE FASCISTA*

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I

In the one-party states, of which the U.S.S.R., Germany, and Italy may be taken as the best examples, the definition of relationships between the party and the state has presented a major problem of constitutional theory. No two of these states have solved the problem in the same way. The C.P.S.U., engineering the dictatorship of the proletariat, depends upon methods which are constitutionally indirect. Only in the Commission for Soviet Control is there a constitutionalized inter-relationship between the mechanisms of the party and the state; for the rest, the party relies upon its political discipline over the public personnel. Indirect reference to the Communist party is contained in the new Soviet constitution, in the guarantee to citizens of the right of "uniting in the Communist party of the U.S.S.R.,"[1] and in the incorporation of the hammer and sickle and the slogan of the party into the emblem of the state.[2] On the other hand, the Nazi régime in Germany prohibited the formation of other parties than the N.S.D.A.P. by the law of July 14, 1933,[3] and, by the law of December 1, 1933,[4] proclaimed the formal union of the party and the state. But not even this extreme form of action destroyed the distinction between party and state, since separate spheres of action are still marked out for each and each has its distinctive system of law.[5] Nevertheless, the relationship in principle between the party and the state was unequivocally determined by positive legislation before the Nazi régime embarked very far upon its program of constitutional reorganization.

Even its opponents will agree that the Fascist régime in Italy

[1] Art. 126.
[2] Art. 143.
[3] *RGBl*, I, 479.
[4] *RGBl*, I, 1016.
[5] Hitler's speech at Nürnberg, in September, 1935, gave no evidence that the party has been "lost" in the state; see W. Sommer, "Partei und Staat," *Deutsche Juristen-Zeitung*, XIL (May 15, 1936), 593–597. The tendency to transform the state into the party-state, or into a "régime," is also well illustrated in the integration of the People's Republican party into the governmental structure of Turkey, and in the transformation of the Fatherland Front in Austria, both accomplished during the summer of 1936.



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has been somewhat less obvious, in its methods, than its Communist and Nazi contemporaries. The Fascists preferred castor-oil to Communist bludgeons and Nazi blood purges. Some obscure national characteristic, perhaps the same cultured Machiavellian quality that produced the "fine Italian hand" of Leonardo da Vinci and the Borgias, dictated the more "delicate" technique. This may also explain why it was only after ten years of black-shirt domination that the relationship of the Fascist party to the Italian state could be traced with some precision. Today it may with accuracy be said that the party is as much an organ of the state as is the Ministry of the Interior. This conclusion does not rest upon positive enactment, but is to be inferred from official pronouncements, judicial interpretations, and the implications of various statutes.

Much of the difficulty in clarifying the situation in Italy results from the use of the word "party" in a special sense; the continuing use of the word in a new meaning has been described as a "residuum of demo-liberal terminology."[6] There is a universal agreement that the Fascist party is not a party in the sense of a political organization aiming at the capture of public office in order to enforce its program; this presupposes a variety of competitive dissensions, differences of opinion, struggles within the body politic, and tactics of political opposition, all of which would vitiate the conception of the state as a totalitarian unity.[7] In Fascist contemplation, the party began as a "movement"—more precisely, as an anti-party movement—opposed in the nature of things to "political" parties; subsequently it adopted the name and technique of a party in order to further its aim.[8] When that aim had been accomplished, the infiltration of the party throughout the state produced the "régime." Then the party, as progenitor of the régime, came to be regarded as an institution possessed of primordial and super-constitutional characteristics. The forms and organization of the *Partito*

[6] G. Bortolotto, *Lo stato e la dottrina corporativa* (Bologna, 1931), I, 363.

[7] G. Ambrosini, *Il Partito Fascista e lo stato* (Rome, 1934), 5–20; C. Costamagna, *Elementi di diritto pubblico fascista* (Turin, 1934), esp. pp. 283–302; S. Panunzio, *Rivoluzione e costituzione* (Milan, 1933), 176 ff; Bortolotto, *op. cit., passim*, esp. p. 364.

[8] A. Marpicati, *Il Partito Fascista* (Milan, 1935), 19–40; G. Volpe, *Lo sviluppo storico del fascismo* (Palermo, 1928), and his *Storia del movimento fascista* (Rome, 1934); M. Canio, *Il Partito Nazionale Fascista e la sua funzione nello stato* (Nuoro, 1935); M. Maraviglia, *Alle basi del regime* (Rome, 1929).

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*Nazionale Fascista* proved convenient means for exercising its super-constitutional vigil. Only an understanding of this typical Fascist interpretation of political and constitutional history can give meaning to the theoretical gibberish of Panunzio, who has said: "The party, as a revolutionary party, created the state; and the state, created by the party, rests, in its turn, upon the party as upon a pedestal."[9] From at least one point of view, then, the party is superior to the state, and its willingness to be incorporated into the state is an act of condescension on its part.

II

Beginning with the March on Rome, three fairly distinct stages in the evolution of the relationship between the state and the party may be noted. In the first period, extending from October 28, 1922, until January 3, 1925, the state appeared to take no official cognizance of the Fascist party. During this introductory phase preceding the formal establishment of the dictatorship, coöperation with minor parties was still sought, and leaders of opposition groups were still represented in the cabinet and in Parliament. Fascists were then accomplishing their purposes through unofficial channels and by various political pressures; the Matteotti incident is exciting and politically important, but devoid of constitutional significance.

A second phase opens sharply with the *pronunciamento* of January 3, 1925, and extends to 1929. This may be called the period of transition, during which the party accomplished its *de facto* identification with the state, laying the foundations for the legalized dictatorship, but holding itself officially, if indiscreetly, in the background. Events of this period made foreign observers ask: "What after Mussolini?" In December, 1925, the Prime Minister became *Capo del Governo* and responsible, parliamentary government was formally abandoned; in January, 1926, the government took for itself sweeping powers to legislate by decree; in April, 1926, the first in the series of syndical-corporative measures was adopted, leading eventually to the corporate state. Concurrently, local popular government was abolished and rigid control over the press established. Only then did the party gradually emerge from

[9] *Op. cit.*, pp. 177–178; Panunzio, "Partito Nazionale Fascista in Italia e Partito Comunista in Russia," *Lo stato corporativo*, II (April, 1934), 72–76; T. Accardi, "Partito-Nazione-Stato," *L'Universalità Fascista*, VII (February, 1935), 224–229.

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the official background: the Law on Public Security of November 6, 1926,[10] did not abolish all forms of political organization, nor did it establish in principle the Fascist party as the sole party; but its provisions were sufficiently broad to enable administrative officers to demolish opposition organizations and to destroy any remaining vestiges of political freedom. In the following month, the *Fascio Littorio* was adopted as the "emblem of the state."[11] And toward the close of the transition period, the local *fasci*, provincial fascist federations, and other institutions sponsored by the party were endowed with corporate capacity as juridical (if not as public) persons.[12] In the course of 1928, the Fascist Grand Council assumed the public function of preparing the official electoral list under the electoral reform of May 17, 1928,[13] and, by law of December 9, 1928,[14] it was given functions of a constitutional character. But recognition of the Fascist Grand Council as an organ of the state was not sufficient to endow the entire mechanism of the party with that quality. At this stage in the evolution, the writers were divided in their opinions concerning the legal status of the party. Liuzzi, maintaining that the Fascist party had not lost its essential quality as a "party," admitted that the party was a juridical person, but only for the purposes of private law;[15] Chimienti thought that the party did not have the attributes of the state and did not express the will of the state, but held that it was properly a "constitutional organ";[16] Jemolo thought the quality of a person in public law might be attributed to the party on the basis of a construction of statutes in force;[17] Panunzio went to the extreme of reading juridical significance into the political activities of the party;[18] while Bortolotto, dabbling in the theory of "régime,"

[10] No. 1848, *G. U.*, November 8, 1926, no. 257, retained in the T. U. (*Testo Unico*) of June 18, 1931, no. 773, *G. U.*, June 26, 1931, no. 146.

[11] R. D.-L. December 12, 1926, no. 2061, *G. U.*, December 15, 1926, no. 288.

[12] Law, June 14, 1928, no. 1310, *G. U.*, June 22, 1928, no. 145; this was amended by R. D.-L. October 18, 1934, no. 1779, *G. U.*, November 12, 1934, no. 265, to give automatic recognition to the *Fasci* and Fascist federations constituted according to the statute of the party.

[13] Law, No. 1019, *G. U.*, May 21, 1928, no. 118.

[14] No. 2693, *G. U.*, December 11, 1928, no. 287.

[15] B. Liuzzi, *Il Partito Nazionale Fascista nel diritto pubblico italiano* (Rome, 1930), 10 ff., 36 ff.

[16] P. Chimienti, "Il Partito Nazionale Fascista nell'organizzazione nazionale fascista," *L'universalità fascista*, III (1931), 27 ff.

[17] A. C. Jemolo, "Natura giuridica del Partito Nazionale Fascista," *Rivista di diritto pubblico*, XXI (October, 1929), pt. I, 544–555.

[18] S. Panunzio, *Sentimento dello stato* (Milan, 1928), 227–233.

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held the party to be an "institution" of the "régime" and, as such, an auxiliary of the state, but not part of it.[19]

In his historic address of September 14, 1929, Mussolini sounded the keynote of the third phase in the party's evolution. To those who then felt that the party, having accomplished the Revolution, was ready to be dissolved, Mussolini declared that the party was the "capillary organization of the régime;" that its "importance was fundamental;" that, had there then been no Fascist party, he would have invented it "as the *Partito Nazionale Fascista* now is—numerous, disciplined, ardent, with a rigid, hierarchical structure."[20] The real question, in his view, had to do with formalizing the relationship between the party and the state: "All dualism of authority and hierarchy [as between party and state] is extinguished." To give effect to these principles, the Fascist Grand Council was reorganized by the law of December 14, 1929[21]—a law which for the first time contained principles concerning the organization and internal discipline of the party. The secretary of the party was thereafter to be named by royal decree—that is, by the king—upon recommendation of the *Capo del Governo* (not *Duce*), and was to become an *ex officio* member of various important state organs and to be eligible to participate in the council of ministers. The members of the National Directory and the federal secretaries were to be named by decree of the *Capo*. And then, for the first time, provision was made that the future statutes of the Fascist party be established by royal decree, upon recommendation of the *Capo*, observing the practices of constitutional legislation, i.e., after consultation with the Fascist Grand Council and the council of ministers.[22] In pursuance of this principle, the party statute was promulgated in the royal decree of December 20, 1929;[23] the pres-

[19] *Op. cit.*, I, 368.

[20] B. Mussolini, *Scritti e discorsi* (Definitive edition, Milan, 1934), VII (1929–1931), 127 ff.

[21] No. 2099, *G. U.*, December 16, 1929, no. 292.

[22] Law of December 14, 1929, arts. 6–10.

[23] No. 2137, *G. U.*, December 21, 1929, no. 297. The party has had four statutes: the first was promulgated on November 23, 1921, under authority of the Central Committee of the newly-organized P.N.F. (Text in P.N.F., *Le origini e lo sviluppo del fascismo* (Rome, 1928), pp. 161–171); the second, dated October 8, 1926, was approved by the Fascist Grand Council (Text in P.N.F., *Il Gran Consiglio nei primi cinque anni dell'era fascista* (Rome, 1927), pp. 219–228; the third was contained in the R. D. December 20, 1929, no. 2137, cited; the fourth (and present) statute is in the R. D. November 17, 1932, no. 1456, *G. U.*, November 21, 1932, no. 268.

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ent statute is found in the royal decree of November 17, 1932.[24] Addressing the first meeting of the National Corporate Council on April 22, 1930, Mussolini remarked upon the appropriate inclusion in its membership of a representation from the party which, "having made the Revolution, can never be a stranger to the institutions which the Revolution has itself established in every field."[25] Hence, ensuing years found the P.N.F. acquiring more steadily the characteristics of an institution of public law, becoming officially identified with nearly every branch of governmental activity, until, eventually, it could be said that the party had become more than an "institution of public law"—that it had become an "organ of the state." The conferment upon the secretary of the party of the status of "minister" as of January 23, 1937, completed the third phase of the evolutionary process.

III

This unprecedented metamorphosis creates, at the outset, a problem of identification. When, precisely, does a "political party" complete its evolution as an "organ of the state"? Certainly the simple fact that the statute of the P.N.F. is contained in a royal decree is insufficient; corporations and other legal persons operating under a charter from the state do not thereby become organs of the state. Nor is conferment of a constitutional position upon the Fascist Grand Council sufficient of itself to give the same status to subordinate organs of the party or to the party as a whole; the Fascist Grand Council, in the regulation of party matters, remains a creature of *Il Duce*. The fact that the secretary of the party became an *ex officio* member of various state boards and councils was inconclusive; various private individuals have, from time to time, been called upon to render the same service without becoming organs of the state. But in the absence of positive statutory definition of the relationship between the party and the state, it is possible to form a judgment based upon the official preponderance of the party in the state, evidenced by (1) the opinions of legislators expressed in legislative debates and reports and the declarations of high official and political leaders; (2) the statutes which, taken in the ensemble, make the rôle of the party a condition indispensable to the operation of the state machinery; and (3) the decisions of Italian tribunals, particularly in the field of administra-

[24] Cited above. [25] Mussolini, *Scritti e discorsi*, VII, 192.

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tive law. Note may also be taken of the opinions of the authorities on Italian constitutional law.

At the time of the discussion in the Chamber of Deputies concerning the project which eventually became the law of 1928 on the Fascist Grand Council, the *relatore* announced that the Grand Council was being made a constitutional organ and, simultaneously, the party was being incorporated "in a certain sense" into the state.[26] At the *Quinquennale* of the régime early in 1929, Mussolini noted that the P.N.F. was steadily taking on the characteristics of an organ of the state; by September, 1929, he had become convinced of the need of establishing those characteristics more securely. Hence, when the Chamber discussed the law of 1929 on the reorganization of the Grand Council—a measure which also contained regulations for the organization of the party as a whole —the *relatore*, Amicucci, declared that with enactment of the measure: "The party has thus *completely become* an organ of the state . . . The project of law perfects the incorporation of the party into the state."[27] This represented the official point of view, even though the legislation was equivocal, and even though some tribunals subsequently held it to be devoid of juridical significance.[28] Much has been heard of the first of Mussolini's reasons for seeking to abolish the Chamber of Deputies—that is, the need of setting up a more adequate form of economic representation. But in his speech of November 18, 1933, Mussolini also announced another: "The Chamber presupposes a world which we have destroyed; it presupposes a plurality of parties . . . Since we have annulled this plurality, the Chamber of Deputies has lost the essential reason for its being."[29] The present Chamber is "Fascist;" the new Chamber will be both "Fascist and Corporative." So, at least, Mussolini indicated in his address before the National Corporate Assembly on March 23, 1936.[30] The Italian press has

[26] *Relazione* November 6, 1928, XXVII Legislature, Chamber of Deputies, Doc. 1638.

[27] *Relazione* December 5, 1929, XXVIII Legislature, Chamber of Deputies, Doc. 325-A.

[28] *Gabani c. Partito Nazionale Fascista*, Trib. Ancona (Labor Section), February 13, 1932, *Massimario di giurisprudenza del lavoro*, 2 ser, VIII (June, 1932), 307.

[29] *Scritti e discorsi*, VIII, 270.

[30] *Popolo d'Italia*, March 24, 1936. By its resolution of November 19, 1936, the Grand Council appointed a committee of five, consisting of the president of the Chamber (C. Ciano), the secretary of the party (Starace), the minister of justice (Solmi), the minister of national education (Bottai), and the minister of corpora-

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long since cultivated the habit of referring to the *Camera dei Deputati* as the *Camera Fascista;* even the unofficial publications of the Chamber are now issued under the new title,[31] although a formal enactment is necessary in order that the change in title be made effective for all purposes.

A clue to the nature of the Fascist party in relation to the state may be found in the position of the *Capo del Governo* as *Duce* and of the *Duce* as *Capo*. Imperceptibly, the position of the *Capo* has undergone a change with respect to the party, and today the terms *Capo* and *Duce* are used interchangeably for certain purposes. The laws of December 9, 1928, and December 14, 1929, concerning the organization of the Fascist Grand Council and the party statute of December 20, 1929, conferred, in specific terms, certain powers of appointment upon the "Head [*Capo*] of the Government, Prime Minister, Secretary of State," while the latest party statute of November 17, 1932, confers some of these powers upon the *Duce*. Thus, the secretary of the party, once appointed by royal decree upon proposal of the *Capo*, is now named by royal decree upon proposal of the *Duce*. Mussolini advises the king, upon occasion as *Capo*, upon occasion as *Duce;* and, what is significant, when the *Duce* advises the king upon the signature of royal decrees he is acting as a "minister" in the most technical sense. Since, therefore, the party statute is now contained in a royal decree, and the *Duce* advises the king as he might advise him as *Capo*, there is more than a personal union through *Duce-Capo* to identify the party with the state. From this point of view, the first article of the statute of 1932, defining the *Partito Nazionale Fascista* as "a civil militia, at the orders of the *Duce*, in the service of the Fascist state," deserves to be taken literally rather than rhetorically. At the beginning, one spoke of Mussolini as *Capo* when describing his official capacity as a minister of the state, and as *Duce* when speaking of his unofficial position in the party. Today, with the party a part of the state mechanism, and the *Duce* an official adviser to the king, the distinction has less than its former validity.

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tions (Lantini), to formulate concrete proposals concerning the membership and organization of the new Fascist and Corporative Chamber. Definitive action is indicated during the course of 1937.

[31] As, for example, the publication, *Opere sul fascismo possedute dalla biblioteca della Camera Fascista al 28 ottobre 1934* (Rome, 1935), which bears the imprint of the *Segretaria generale della Camera Fascista*. In his foreword, Count Costanzo Ciano, president of the Chamber, refers to the work of the *Fascist Chamber;* and the compiler, Dr. Damiani, describes himself as librarian of the *Fascist Chamber*.

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Much has been said of the Fascist Grand Council as an organ of the state.[32] It is now only necessary to remark that the members of the Council enjoy the immunities of members of the Senate and Chamber of Deputies;[33] that they are given special protection in the penal code of 1930 against attacks upon them and against those who would vilify them;[34] that as members of the party they enjoy a protection from the disciplinary action of the party secretary greater than that enjoyed by members of the legislative bodies;[35] that the secretary of the party may, *ex officio*, be designated as the substitute for the *Capo del Governo* in the presidency of this constitutional organ. The rôle of the Council in relation to the designation of subsequent heads of the government is clearly defined in law. The fact that the Council must be consulted on measures of a "constitutional" character before the council of ministers and Parliament take action indicates, at least, a chronological supremacy. One of the interesting by-products of Fascist legislation is that Italian law now recognizes a special set of laws as having a "constitutional character," whereas such a distinction had not been made in the *Statuto* of 1848. These capacities of the Grand Council are alone inconclusive in defining the party's position in the state; but taken in connection with the great mass of legislation of which they are only a part, they lend authority to the final conclusion.

In the form of a brief summary, there may be indicated the more notable official points of contact between the party and the state, apart from the position of the Grand Council on matters of a constitutional character and its responsibilities in the preparation of the electoral list:[36]

1. By the law of December 27, 1928 (no. 3123), a representative of the party, appointed for a four-year term by royal decree, was brought into the membership of the provincial administrative *giunta*. Subsequently, by the local government law of March 3,

[32] See R. Sofia, *Le legge costituzionale e il Gran Consiglio del Fascismo* (Palermo, 1931).

[33] Art. 9, Law of December 9, 1928. [34] Arts. 289, 290.

[35] Art. 9, Law of December 9, 1928; Art. 22, Party Statute, 1932. Disciplinary action against Council members may be taken only with authorization from the Council; Fascist legislative members may be disciplined by the secretary of the P.N.F. (but not by inferior officers).

[36] Electoral Law of May 17, 1928, no. 1019, *G. U.*, May 21, 1928, no. 118, included in the *Testo Unico* of September 2, 1928, no. 1993, *G. U.*, September 8, 1928, no. 210, supp.

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1934,[37] the *giunta* was made to have four representatives of the party, designated by the party secretary. Hence the party is given an official voice, as such, in the most important administrative council of the province; but beyond this lies the political relationship between the prefect and the federal secretary of the party. Even though Mussolini once promised to abolish duality of authority and to relieve the prefect from the danger of control and domination by the federal secretary, this purpose has not been realized in practice.

2. Since January 14, 1923, the armed forces of the party (M.V.S.N.) have been included among the official armed forces of the state.[38] The original militia has been supplemented by other militia performing functions in special fields: railroads, ports, posts and telegraphs, forests, roads, and airport. It will be observed that a militia organization has thus been set up to protect the régime in the vulnerable points at which revolutionary activity might develop.

3. The party statute of 1932 brings into the membership of the national directory of the party representatives as such of certain governmental departments: the Ministry of the Interior, the Ministry of Corporations, and the Commandant-General of the M.V.S.N.

4. Since December 17, 1932, membership in the party or in the juvenile *Fasci* has been a prerequisite for the taking of state examinations. Hence the former requirement that candidates for admission into the public service be of good "political character" has been more precisely implemented.[39] But it is not sufficient that this requirement should have been satisfied at the time of admission; the application of extreme measures of party discipline (expulsion) against a member is sufficient to terminate his connection with the public service.[40]

5. Of the greatest legal and constitutional significance is the

[37] No. 383, *G. U.*, March 17, 1934, no. 65, spec. supp; Steiner, "The Italian Law on Communal and Provincial Government," *National Municipal Review*, XXV (September, 1936), 524.

[38] R. D. no. 31, *G. U.*, January 20, 1923, no. 16.

[39] Decreto del Capo del Governo, December 17, 1932, *G. U.*, December 21, 1932, no. 293.

[40] Art. 20 of the party statute of 1932 reads: "The Fascist who is expelled from the P.N.F. is banned from public life." Whether this automatically applies to Fascist members of the legislature upon their expulsion from the party is not clear.

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royal decree-law of January 11, 1937,[41] which confers upon the secretary of the P. N. F., in addition to his other qualities, "*the title and the functions of a minister, secretary of state.*" As early as 1928, the secretary of the party (Turati) was summoned to attend sessions of the council of ministers, and his capacity so to participate was confirmed by the party statutes of 1929 and 1932. But before 1937 his actual participation depended upon the summons of the president of the council.[41a] Now, as a minister *ex officio*, he occupies the government bench in the Senate and Chamber of Deputies and enjoys the right of advising the king, as he is advised by his other ministers, upon the issuance of royal decrees. The party secretary is expected to make use of the instrument of the royal decree to give effect to measures which, heretofore, have been simply party instructions, published in the *Fogli d'ordini* of the party and the *Fogli di disposizioni* of the secretary. The relationship between Mussolini and Starace becomes substantially identical with that existing between Hitler and Hess. In addition, the party secretary continues to be *ex officio* a member of various other state agencies, such as the Central Corporative Committee and the Supreme Defense Council.

6. Especially significant has been the function of the party in the sphere of corporate action. (a) The Labor Charter was prepared by the Fascist Grand Council[42] and, while it never was formally enacted as a statute, subsequent legislation has established the Charter as a basic standard to guide corporate agencies and has authorized the government to issue rules with legal force for its execution;[43] (b) the law of March 20, 1930, on the National Corporate Council,[44] brought the vice-secretaries of the party into the Council and confirmed the membership of the secretary in the Council and in the Central Corporative Committee; (c) the Law

[41] No. 4, *G. U.*, January 23, 1937, no. 18, effective on the date of its publication.

[41a] Turati was summoned by R. D. December 16, 1928, *G. U.*, December 27, 1929, no. 301; Starace, by R. D. December 14, 1931, *G. U.*, December 19, 1931, no. 292.

[42] April 21, 1927, *G. U.*, April 30, 1927, no. 100. The publication of this party deliberation in the journal reserved for laws and decrees is a significant circumstance. A. Giannini, *Tendenze costituzionale* (Bologna, 1933), 265; D. Donati, "L'efficacia costituzionale della Carta del Lavoro," *Archivio di studi corporativi* (February, 1931).

[43] Law of December 13, 1928, no. 2832, *G. U.*, December 24, 1928, no. 298.

[44] No. 296, *G. U.*, March 28, 1930, no. 74.

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of February 5, 1934,[45] on the organization of the corporations provided that they are to meet under the presidency of a minister or under-secretary of state, or the secretary of the party, as the *Capo del Governo* may determine; (d) the decrees establishing the twenty-two category corporations provide for the inclusion in each of three representatives from the party. In no other aspect of the work of the Fascist régime has the party been so apparent and vital, whether officially or unofficially. Mussolini has summoned the party to protect, defend, and motivate the corporate state as its most precious creation. As one writer, paraphrasing his words, has put it: "Only the party can prevent the system from becoming static and conserve perennially the dynamism of corporate action. Only the party can surmount all class-feeling and factional pressure. Only the party can moderate the differences between the productive categories, harmonizing them in the superior interests of the nation."[46] In the work of the party's provincial intersyndical committees (in each province) and price committee (in Rome) is found the essential clue to the practical operation of the corporative state. The price committee of the party, which has functioned for several years, was first recognized officially in the royal decree-law of October 5, 1936.[47] The lira having been devalued on that date, the government realized the necessity of preventing speculation and price increases; but instead of calling upon the formal machinery of the Ministry of Corporations, power was given to the party price committee to fix the wholesale and retail prices of all commodities offered for sale. Heavy penalties, in addition to personal and political pressures, give effect to the decrees and orders issued by the price committee (and by provincial intersyndical committees) in the performance of this quasi-legislative function. But for several years before their formal recognition, the party committees had actually been in control of the situation.

[45] No. 163, *G. U.*, February 20, 1934, no. 42.

[46] C. Petrone, "Il Partito e le corporazione," *Politica sociale*, VI (May–June, 1934), 181–184. Secretary Starace reported in a similar vein to the National Directory, February 5, 1935, as quoted in *Sindacato e corporazione*, LXIII (February, 1935), 293–294 (footnote).

[47] No. 1746, *G. U.*, October 5, 1936, no. 231; complete text in *Popolo d'Italia*, October 6, 1936. On the early function of the party with respect to prices, see D. Gardini (chairman of the price committee), "L'azione del Partito sui prezzi," *Commercio*, VII (June, 1934), 340–342.

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IV

On May 20, 1932, the Court of Cassation handed down a judgment of fundamental importance concerning the legal relationship between the party and the state. This was the Maddalena case,[48] which arose upon a not unusual situation of fact, and in which the Cassation held that a member of the party hierarchy held the status of "public officer." Maddalena, a party member, had protested with undue vigor against a disciplinary measure taken against him by a federal (provincial) secretary, whereupon he had been charged with the crime of *oltraggio* against a public officer.[49] The court of appeals at Naples decided that certain party hierarchs enjoyed the status and immunities of public officers when performing duties of a public character specifically imposed upon them by law, e.g., as when members of the Grand Council prepared the national electoral list of candidates for election to the Chamber of Deputies under the law of 1928. Otherwise, the lower court held, a party official enjoyed no protection as a "public officer." This holding was reversed by the Court of Cassation, which first satisfied itself that the Fascist party was not a mere political "party" in the traditional sense: "It is not an aggregate professing the same political opinions, working within the state and sometimes against the state. . . ." Then, after a thorough analysis of political declarations and pertinent legislative enactments relating to the party's rôle in public affairs, the Cassation concluded: "The *Partito Nationale Fascista* should be considered as an organ of public law, and its hierarchy, whether collegial, central, or peripheral, as invested with public functions and thus as public officers, even when, as in the present case, they are exercising disciplinary functions over persons inscribed in the party."[50] The Maddalena case related to the status of federal

[48] *Foro italiano*, 1932, pt. II, 209, reversing judgment of the Court of Appeals at Naples, *idem.*, note; also in *Scuola positiva*, 1931, pt. II, 505.

[49] In the sense of Art. 207 of the Penal Code of 1889, then applicable: "Anyone who, by word or act, offends in any way the honor, reputation, or dignity of a member of Parliament or of a public officer in his presence and because of his functions, is punished . . . ."

[50] The fundamental difference of opinion between the Court of Cassation and the court of appeals is reflected also in the opinions of writers. The following, among others, support the view of the Cassation: C. Caltelli and E. Romano di Falco, *Commentario teorico-pratico del nuovo codice penale* (Rome, 1930), II, pt. 1a, §810; E. Battaglini, "Diritto di censura e diffamazione anche in relazione alla natura giuridica del Partito Nazionale Fascista," *Giustizia penale*, 1930, pt. I, 1004; A.

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secretaries, but its principle was also applied to local secretaries. In the Dolce case, for example, action was begun against a local secretary whose peculations with party funds were held properly triable under Article 314 of the Penal Code which related to the defalcations of "public officers."[51]

The doctrine that members of the party hierarchy are to be regarded as "public officers" is broad enough to apply to the secretary of the party, to members of the party directorate, and to the federal and local secretaries and federal and local directories. It does not, however, give that status to the rank and file of the party membership. The jurisprudence which developed with respect to party organs, speaking strictly, has also been applied to its affiliated institutions, such as the Voluntary Militia of National Security and the *Dopolavoro*.[52]

While most of the courts accepted the view of the Court of Cassation, the absence of positive enactment has given other tribunals leeway for various interpretations. On at least one occasion, a court went beyond the conception of the Cassation to endow the provincial federations of the party with the status of "constitutional organs."[53] Tribunals have also used various approaches to the question. Whereas the Cassation looked to political pronouncements and the implications of legislative enactments, the tribunal at Salerno thought that the "public ends" which the party served transformed it into "a great institution of public law."[54] To clarify

Visco, *Milizia, Partito e sindacati nell'ordinamento giuridico* (Rome, 1931); G. Verna, "Il Partito Nazionale Fascista 'associazione privata'?," *Rivista penale*, 1932, pt. I, 603; A. C. Jemolo, "Natura giuridica del P.N.F.," *Rivista di diritto pubblico*, 1929, pt. I, 544–555; R. Messimi, "I gerarchi del fascismo e la pubblica funzione," *La pretura*, 1932, p. 309. The following were in opposition: B. Liuzzi, *Il Partito Nazional Fascista nel diritto pubblico italiano* (Rome, 1930); B. Cassinelli, "Il segretario politico del P.N.F. non è pubblico ufficiale," *Scuola positiva*, 1931, pt. II, 505–512; F. Manci, "Il segretario del P.N.F.," *Vita forense*, 1931; and N. Levi, *I delitti contro la pubblica amministrazione* (Rome, 1930), 81 ff.

[51] Dolce case, Tribunal at Turin, March 30, 1934, *Giurisprudenza delle corti regionale*, 1934, pt. II, 215; cf. Maresca case, Pret. Osimo, May 7, 1934, *Foro italiano*, 1934, pt. II, 373 n. The praetor at Caltanissetta reached a similar conclusion, without the same examination of principle, in the Tulumello case, April 24, 1930, *Giurisprudenza italiana*, 1931, pt. II, 133.

[52] "B" case, Court of Appeals, Venice, December 16, 1932, *Foro venezie*, 1933, p. 723, on the M.V.S.N.; Marini case, Cassation, January 25, 1933, *Foro italiano*, 1933, pt. II, 438, on the *Dopolavoro*.

[53] *Bocelli* c. *Feder*, Tribunal at Savona (Labor Section), November 19, 1932, *Diritto del lavoro*, VII (March–April, 1933), pt. II, 126.

[54] *Bellelli* c. *Paladino*, November 30, 1931, *Massimario di giurisprudenza del*

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the situation, especially with respect to the application of labor legislation to the employees of the party (office staffs, newspaper editors, and others), there is now felt the need of legislative definition. Until this is brought about, tribunals will differ in the application of principles concerning the party character in precise cases. But while this confusion may continue for some time, the basic principle has been judicially defined: the party is an organ of the state, and its officers are thereby entitled to rank as public officers.

While this discussion has been concerned primarily with the juridical position of the Fascist party in the Italian state, it must be remembered that there is no sphere of Italian life in which the party has not made its influence felt. As Mussolini has put it, the party performs an "apostolate" and "gives to the authority of the state the meaning of a faith."[55] An important social function is assumed by the party, which, through the *Dopolavoro* and its affiliates, administers an educational (propaganda) program; and which, through insurance and welfare activities, maintains a relief program. In the military sphere, the M.V.S.N., in which all able Fascist party members are now obligatorily enrolled,[56] constitutes one of the armed forces of the state—not alone for internal police, but for external purposes as illustrated in the Ethiopian campaign. Administratively, the party supplies the public personnel. Politically, the party lays down the line of public policy and is responsible for the program of Fascist indoctrination. Especially significant have been party activities in the economic sphere. Here, the party directs the application of state-decreed economic principles, not only through extra-legal pressures but through its intersyndical and price committees. It is notorious that the "corporations" upon which the corporate state theoretically depends were not brought into life until 1934; yet the party had, before that time, supplied the power which made the corporate state a reality in the 1920's. Nor has the party confined its activities to continental Italy: its Fascist Colonial Institute has for many years cultivated an intensive colonial and expansionist propaganda; its M.V.S.N. fought

*lavoro*, 2 ser., VIII (June, 1932), 307; *ibid.*, Naples Labor Magistracy, February 7, 1933, *Diritto del lavoro*, VII (March–April, 1933), pt. II, 124. Cf. M. La Torre, "Sulla figura giuridica degli impiegati del P.N.F. ed organi independenti," *Massimario di giurisprudenza del lavoro*, 2 ser., VIII (June, 1932), 308–314.

[55] *Scritti e discorsi*, VII, 141. (Speech of September 14, 1929.)

[56] Decision of the Directory of the P.N.F., May 17, 1936.

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in Africa; and, once Ethiopia had been conquered, the party organization was set up in East Africa contemporaneously with the advance of military forces, in some instances antedating the establishment of civil government.[57]

From the long-range point of view, the Fascist party has been responsible for two developments of great significance: (1) in the sphere of public law, the party has occasioned and aided the development of a new conception of public order, resulting in principles which lead to the better understanding of the function of the political party in the one-party states in general; and (2) the party, having sponsored the Fascist régime, gives the new order in Italy the constitutional and mechanical basis for permanence which makes it reasonable to suppose that the Fascist dispensation will not necessarily pass with the passing of the figure who created it.

[57] H. A. Steiner, "The Government of Italian East Africa," in this REVIEW Vol. 30 (October, 1936), pp. 884–902, at 886–887.

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# POLITICAL LIBERTY TODAY: IS IT BEING RESTRICTED OR ENLARGED BY ECONOMIC REGULATION?

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The liberty of any given citizen is inhibited by four great enemies. The first enemy is outer—the inhibition of the liberty of one by the liberty of others. The other three are inner enemies—illness, poverty, ignorance. The outer enemy is commonplace to political scientists. And so it is this inner triumvirate against freedom which I wish first and mainly to discuss. Worst of the three is ignorance.

Pure liberty would consist simply in doing what one wants to do. Illness is enemy to this ideal not merely because illness weakens wants, but also because it aborts the very formation of virile wants. Poverty is enemy not only because it stunts the growth of healthy wants, but because it circumvents efficacy of efforts to fulfill any and all wants. Ignorance, however, is worst of the three, not only because it fortifies the other enemies, inner and outer, but because it also converts such regulation of elemental wants as is made inevitable by civilization into the psychological poison of aggression and thereby estops fructifying sublimation of the crasser forms of freedom. This inner enemy No. 1 operates most invidiously when it becomes the superstition of the autonomy of the economic in the hierarchy of life's values. The cause of general human freedom—assuming this as the full meaning of "political liberty"—requires nothing today so much, therefore, as the putting of the economic in its place. This rectification is necessary before the problem of freedom can be approached without paralyzing prejudice. Let this, as well as the fact that I am a philosopher, be my apology for concentrating upon the general.

The current primacy accorded the economic comes not by divine right. Indeed, what in a civilized life is the place proper to the economic is not yet clear. This very lack of clarity, opened to remedy by acknowledgment, is frequently converted into a dogmatic usurpation of the prime place for the economic. From this preëminence it can be, and ought to be, dislodged. The indubitable fact that man cannot live without bread is raised by simple logical error into the faith that bread is all important in the life of man: its pro-



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duction, its distribution, its consumption. Utility is primary only in the life of animals, if indeed in the life of animals. As for humanity, man the animal is also the animal Man. Give him luxuries and he grieves little for the necessities. In proper perspective, man's distinctive life is in his reach, seldom in his grasp.

What foreshortens his reach is less obviously subject to regulation than what lessens his grasp; and yet we have not hesitated to legislate against man's vaguer enemies, ignorance and illness, in the interest of his greater freedom. That ancient sphere of anarchy, paternal prerogative, we have invaded to compel school attendance in order to grapple with the enemy, ignorance. We have widened the police power of the state to compulsory immunization against certain diseases, to inspection of food and water, to disposal of garbage and waste. Even tomorrow, the right of men and women to enjoy syphilis in secret and the right of doctors not to know or to know and not to tell, threaten to follow into oblivion the earlier unmolested right to have, to hold, and to scatter smallpox or to sport in public the blessed evidences of mumps. Whence arises the fear to deal regulatively with the obvious enemy of freedom—poverty—when we have so heroically and so effectively been dealing with the less obvious enemies—ignorance and illness? The temper that points with pride to all acts consummated in a given direction and views with alarm all proposed acts in the same direction—this temper is justly suspected of suffering from some logical distemper or of being inhibited by some distorting phobia. Whatever the final explanation, there seems to be at work a deadly deference for the whole of the economic, as there remains a superstition defensive of diseases still paradoxically labelled "social."

### I. STRANGE ECONOMIC BEDFELLOWS—CAPITALISM AND COMMUNISM

How deep, indeed, lies this presumed generalized immunity from regulation of the economic may be seen in noting that the superstition constitutes the strongest bond common to capitalism and communism. What we do not easily see in ourselves we may clearly enough discern in our enemies—especially when the enemies are such blood kin as communists are to capitalists. The soviet Marxist veritably believes that economic classes are the basis of all strife and their abolition the *sine qua non* of justice. From this doubtful belief the Marxist goes pell-mell to the even more doubtful faith

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that the economic is made ethically poisonous by the injection into it of motives of privacy. Purify the economic of this poison of privacy and you will, he seems to believe, purge it of all its putridity. Direction of the communally-owned is supposed to awaken no cupidity, to stir no sleeping preference for power. Thus purged through communal ownership, capitalistic malevolence becomes communistic benevolence merely by a relocation of the ownership of means of production. Whence arises this miraculous transvaluation of values?

From this fact: that the devil of communism was deity to the classical economists, at whose knees Marx learned his catechism. The most abiding characteristic of the "divine" in all periods, let us remember, is that it lies beyond human control. Roughly, the economic did, and perhaps does, lie beyond the control of economists. (This is so largely because it is heavily intermixed with the political, which they cannot control.) The economists have softened the hard-boiled secularity with which they sought to compensate for the divine nexus of their subject-matter, have done so through the belief that what is beyond control does not in this event need to be controlled. It operates beneficently because it somehow controls itself with our good as increment, earned or unearned. The step which transforms what is beyond control into that which controls itself for our good prepares us psychologically (though the logic of this is not written into any syllogism) for a third step: that which we cannot control, controls us. Trifle with it at your peril! Let it alone and be blessed! By these steps, or some such steps as these, we see the economic given primacy, for better or for worse. As long as this primacy appeared generally to be for weal, the autonomy of the economic was thought to be maintained by some beneficient even if invisible hand. When it came to appear to be for woe, deity was transmuted by Marxism into devil; and—such hold has the bizarre on man!—Marxism set about the conversion of this devil into proletarian deity. Behold, as in a dream, the rise of a classless society merely by converting the economic from private to communal ownership!

These words, "deity" and "devil," are of course vague terms; but capitalism and communism are themselves symbols to conjure with—esoteric and grandiose, expansive and exciting. They shed little light, perhaps; but—oh, my fellow-politicians—what warmth they carry, what heat they generate! And what a falling off in

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fervor—my fellow-countrymen—when we renounce these soul-chilling, these heart-warming words!

## II. A CORRECTION OF PERSPECTIVE

Renounce them we must, however, not merely because they proceed upon the all-or-none logic characteristic of intellectual adolescence, but also because they carry the false implication of both the autonomy and the primacy of the economic in human life. Doth not all human experience conspire to cast doubt upon these claims? The very effort to define "property," or "the private," or "the communal," will teach the analyst better than to believe in the autonomy of the economic. Observation of childhood can disabuse us of any notion that the useful rather than the playful or the pitiful, or even the holy or the beautiful, is primary in human experience. Reading of the poets, those ageless super-surgeons of the soul, will arrest this error. An hour with any genuine artist will teach us more of man than a year with all the economists can. And, finally, if with the too accultured nostalgic we seek classical authority, let us remember that in Plato's dream of a more just justice and in Aristotle's conception of a more legal law traders were degraded, artisans were only half free, and the whole of the economic was put where the child's conduct, the artist's lessons, and the grown man's reverie suggest—at or near the bottom of the hierarchy of human goods. How little unsuborned universal experience there is which supports the notion that the economic is such in nature or location that interference with it *must* somehow depreciate liberty!

But that it may do so I do not deny; I do not even doubt: anything *may* do anything—or nothing. Such is the latitude of the incidence of the possible upon the actual. What *must* be so, however, is for the gods; what *may* be so is for men. I do not doubt but that the classical thinkers under-played, as we have got into the habit of over-playing, the significance of the economic in relation to human freedom. If what I have said about communism and classicism serves to suggest the sterility of the all-or-none principle, I am now prepared to dismiss extremes and with the caution of compromise befitting a politician to make my main point. It is twofold: (1) we do not yet know at what point political regulation of economic life yields diminishing returns to liberty, not even for a given *locale* like contemporary America; and certainly we have

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no formula authentic for universal applicability; and (2) we have urgent motivation for trying to find out more than we know, from the fact that our former deference to the economic has proved sufficiently unfruitful, in both its capitalistic and its communistic forms, to be always threatening to undermine the anywhere prevailing economic structure by overthrowing the given political controls thereof.

### III. FREEDOM IS OF THE WHOLE MAN

For our guidance in this no-man's-land between all-or-none simplicities, it is not enough to see the over-simplification of the "economic man." Even Walter Lippmann has seen this, and still he talks, with Herbert Hoover, in the all-or-none mood which tends to identify regulation and regimentation. We need to see, indeed, the complexity of man political and to understand the articulation of man's several sectors with what is certainly one sector, the economic. We need to free the mind's eye from preoccupation with dogma so that we can watch with all three eyes the effort necessitated by circumstances to achieve a regulation that is not regimentation. Fear of regulation has more than once delayed remedy past the hour of moderation. Along with income as motive of conduct, we must evaluate security and deference, inquiring particularly as to the mutual sublimatory potency of each of these three motives for the frustrations arising from the others.

Assuming for this general inquiry that the main question is not whether we shall continue to have, as we have had, much economic regulation, but who is to do the regulating, for whom, how, and why;[1] assuming, furthermore, that politicians can learn self-restraints as well as others can, from both prudence and principle—assuming all this, I affirm the faith that in America today political liberty is being enlarged by economic regulation. I say "faith" advisedly; for I do not suppose that I can conclusively prove anything in a field as imaginatively affluent as that marked by omnibus terms like "liberty" and "political."

But what cannot be either assumed or proved may nevertheless be argued, and amicably to argue a proposition may be to appre-

[1] Discerning readers will here and elsewhere perceive my indebtedness to Mr. Harold D. Lasswell. Reference should be made particularly to his latest book, *Politics: Who Gets What, When, How?*

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ciate or to depreciate its plausibility. In this spirit, and with reference to this modest goal of plausibility, let me warm to my argument by now asserting outright that liberty has the wide spread of that trinity of motives already imputed to it. Whatever furthers any human motivation enhances liberty, unless it contracts another motive more than it expands the one. Comfort, money, and fame—these are man's main quests; and the limitation of one through regulation may conceivably mean, and according to my thesis does mean in America, the furtherance of one or both of the others. Whether a given regulation enlarges the total liberty of man depends, of course, upon the ranking of motives and the sublimatory resiliency of citizens. There is no need to argue about the N.R.A., A.A.A., or what not, until we are cleanly quit of some dogmatic assumption that regulation must mean regimentation.[2]

This clear, we can criticize proposed regulation in the light of alternatives, rather than damn it with a dogma. If regulation of profit, for instance, stirs up such aggressions as to foredoom to failure the substitution of pride or safety as adequate further motivation for those regulated, then for them much is lost. A miser who loves only his money has not much left to love when his money is lost. But not all need be thus lost save to misers. It is this belief in non-economic compensations for economic loss which founds the faith that economic regulation, even when it means less profit, may effect in a democracy what it does not easily effect out of a democracy, i.e., the general enlargement of liberty. A democratic philosophy may indeed empower men to say, with Filene the merchant: "Why shouldn't the American people take half my money from me? I took *all* of it from them."

Now economic regulation may be but the prevailing rules of the game, and so remain unobserved; or it may take the observed but indirect form of tariff regulation, currency control, use of the budget for humanizing the business cycle; or it may squint at the

[2] Forgiving Mr. Hoover—for he knows not what he says—and passing Mr. Walter Lippmann by—for he knows more than he says—let us focus eyes for a moment upon Mr. Ogden Mills, that average, earnest, befuddled citizen. Denying that there is "any middle ground," Mr. Mills continues: "We can have a free country or a socialistic one. We cannot have both. Our economic system cannot be half free and half socialistic." (*Liberalism Fights On*, p. 70.) Could anything be more impercipient than that? Not only *do* we have what Mr. Mills says cannot be, but such a middle course is, when seen objectively, just the desideratum of a democratic society.

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collectivistic by fixing prices, lowering or raising hours of work, or intensifying or lessening friction which comes from conditions of work and from forms of association in and out of work. Let us, for convenience, agree to cover the whole of the economic under the head of income, and let us illustrate the matter in this more stringent realm of regulation. Does anyone deny that the raising of a worker's income may enhance the worker's liberty? He had better not deny it; for in doing so he is denying that the liberty of employer is involved, negatively, in the regulation. What is sauce for the goose is sauce for the gander—in terms of liberty, that great sauce-bowl of human life. Let us go one step farther: does anyone deny that the worker's liberty may be enlarged by improving his security, even though his income remain the same? Or by adding a cubit to his pride through enabling him to have some voice in management, even though neither his income nor his security were thereby increased? These conditions grow more and more contrary to American fact, to be sure; but, putting the matter at the extreme, does anyone doubt that men so prize security and deference—or even deference alone—that they will, for the sake of this, composedly enough suffer loss of property, diminution of income, and recession of the whole physical standard of living?

I cannot suppose that anyone doubts this, for it is a matter of daily knowledge: of introspection if not of observation. But liberty consists in doing what one wants to do—and, we may now add by common consent, in being what one wants to be. Since in general we must admit that a man is free when he feels and keeps on feeling that he is free, we must come out with the conclusion that political regulation may enlarge the economic freedom of some men and may enlarge the general freedom of some, with or without the enlarging of their economic freedom.

The truth is that politicians are always interfering with somebody's economic freedom for the sake of somebody else's freedom, economic or otherwise; and if the intended beneficiaries are pleased with the results, their freedom is enlarged. If all cannot be benefited at the same time, then some at one time and some at another, with the hope that it will be a majority at all times. We had best not forget the deep and persistent human feeling that the door to doom and the face of fortune are both justly rotated by Fate, all the gods serenely looking on if not roundly applauding the eternal rotation. Even if, dropping metaphor, there be no logic save that

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of convenience and necessity back of the utilitarian criterion, "the greatest good of the greatest number," and if there be no argument save sentiment to back up the Benthamite addendum, "each to count for one and nobody for more than one," these are adequate grounds for our conclusion that political regulation of the economic, which is everywhere actual, may become desirable through enlarging rather than restricting human freedom in general.

### IV. WHAT IS POSSIBLE AND ACTUAL IS DESIRABLE, IF ACCEPTABLE

So far, however, I have been arguing like a philosopher and an ignorant man—arguing about what is possible and claiming that we do not know enough to deny the possibility of enlarging political liberty through economic regulation. I have felt it necessary to do this because the economists, driven by some hidden dogma of necessity, have tended either to deny the possibility of actual regulation or to affirm the impossibility of anything coming out of it for liberty. If either observation of men or reflection upon the complexity of their motives gives us a free field of possibility, then I am content and prepared to argue probabilities inside this field of established possibility.

We shall save ourselves a lot of confusion here if we put the matter as simply as we can. If enough men want a shifting of economic advantage to get it, and enough men keep on wanting the shift to maintain the machinery of it, then human freedom is being enlarged by the given regulation. Success of regulation, or lack of it, can be measured—whatever economists may think to the contrary—only by the willingness of men to put up with the results. The extent of the regulation is important only as determined by what is crucial—the method of it. The method is crucial, because it largely determines the limits of tolerance toward its results. It determines the economically unearned increment of value for the beneficiaries, which accompanies the economic regulation; and it also determines the compensation possible to those regulated, as regards sublimation of the aggressions normally accompanying the withdrawal of liberties.

Let it now be clear that what I have been saying psychologically can be put politically in a phrase: the superiority of the democratic process for purposes of regulation. Any regulation of economic life which can be had by common consent (even if the commonalty

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reach no further than acceptance of it as only less bad than the other visible alternative) is potential of liberty enlargement. For what wise one is willing to become a plain wiseacre by denying to men the values which they themselves reaffirm in the full light of consequences?

Beyond the point where economic loss through regulation means eventual economic gain through better purchasing power and enhanced morale, the loss of economic liberty through regulation may, then, compensate itself with such increments of freedom as are connoted by security and deference. This compensation, possible for all, is easy for those in whose philosophy of life sportsmanship plays a rôle above the level of pretense. Which of our three motives is greater, more conducive to freedom of the entire personality, is not for me to dogmatize. There are men and men *and* men. Some cultures elevate one motive, some another. The economic is not dispensable but is certainly minimizable; the deferential is indispensable and is certainly maximizable. The security *motif* partakes of both the others. The fact that all motives operate in each person reveals the complexity and the endless variety of man. The fact that deference may attach to, and security arise from, economic objects indicates that, but for some narrowing dogma, the economic might widen itself through the social to the aesthetic. Men may devote themselves to *making* money as well as to making *money*, and even to *giving* money rather than making it. We have taken the economic at the narrow disadvantage to which its devotees have reduced it and have suggested that the best can be made of the worst. What best could be made of the best we are not now privileged to inquire. But surely the very year in which we have begun to deal seriously with the expansion of liberty through legislation aimed at enhanced security is not the time to settle with the superstition of a dogma such American prospects as can be really settled only by actual outcomes, measured by future acceptance or rejection at the polls.

## V. A SUMMARIZING WORD

I for one take heart from discovering (1) that the dogma of the autonomy of the economic is a superstition, not a necessity; (2) that regulation which is possible and observable is actual; (3) that the regulation which is actual is desirable for freedom so long as it is achieved by common counsel and is maintained by agreement

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ever renewable in the shift of shifting consequences; and (4) that such regulation of economic life as we now have in America is friendly to freedom and may be counted upon to continue to be of this sort, as long as democratically achieved and implemented.

To think otherwise, and to act otherwise, is to desert the guardian genius of our Western Way. What of regulation representatives of the people enact constitutes, in the democratic process, an *hypothetical* enlargement of political liberty; what the people themselves accept upon enactment by their representatives constitutes an enlargement *presumptive;* and what the people confirm in the light of fuller consequences constitutes enlargement *demonstrable.* If this faith in democracy be not sound, there exists no public way of proving it unsound. Sound it is if we hold it so and make it so. Faith in its soundness has provided remedies progressively for our ignorance and illness. Such further faith may yet prove remedial of our economic cancer, i.e., the poverty of both unemployment and blighting employment.

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# CONSTITUTIONAL LAW IN 1935–36

## THE CONSTITUTIONAL DECISIONS OF THE SUPREME COURT OF THE UNITED STATES IN THE OCTOBER TERM, 1935

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As was pointed out a year ago in this REVIEW,[1] the Supreme Court was able to deal with the cases involving the New Deal which came before it during its 1934 term without any striking enlargement of judicial power and without the announcement of any novel constitutional doctrine. The N.R.A., the Gold Clauses, the Farm Bankruptcy Act, were dealt with by the familiar processes of deciding whether Congress had actually exercised a power not granted to it by the Constitution, or had exercised a granted power in a forbidden way. The New Deal issues which came to the Court during the 1935 term were quite as far-reaching in significance and were certainly not of a routine variety. They involved, in some cases, constitutional clauses never before interpreted by the Court. Some of the federal laws under attack were obviously exercises of delegated powers, but at the same time, they exercised delegated powers for purposes which were novel and which had been commonly supposed not to be within the reach of federal authority. In dealing with laws of this type, the Court brought forward and established as a working implement of constitutional construction the so-called doctrine of "dual federalism."

This doctrine, first labeled and cogently criticized by Professor E. S. Corwin,[2] holds that the delegated powers of Congress are limited by the existence of the reserved powers of the states. Concretely, it means that the delegated power to tax or to appropriate money raised by taxation may not be used to accomplish purposes which lie within the field of the reserved powers of the states. This doctrine had been used as a supporting argument by the Court when it invalidated the first federal child labor law in the case of Hammer v. Dagenhart.[3] During the 1935 term, it served as the basic doctrine in several cases and achieved thereby the status of a dominant doctrine of constitutional law.

Two aspects of this doctrine may be noted. First, it is a theory which tends to prevent the extension by implication of federal power. It prevents Congress from controlling, through the technically correct exercise of a granted power, matters which have before been left to state control. It is, in short, a powerful bulwark for traditional states' rights. Second, the doctrine of dual federalism necessitates an important extension of

[1] See Vol. 30, p. 51.
[2] See his discussion in the first chapter of *The Twilight of the Supreme Court.*
[3] 247 U.S. 251, 1918.



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judicial power. In applying it, the Court must decide not merely whether Congress is exercising a delegated power, but whether it is exercising that delegated power for a purpose which seems to the Court to fall within the proper range of federal authority; the Court assumes the responsibility of passing upon the purposes and motives which have led Congress to exercise its delegated powers. As Mr. Justice Cardozo neatly puts it, this "extends the processes of a psycho-analysis to an unaccustomed field."[4] It is clear that the application of the doctrine of dual federalism greatly enlarges the opportunity and the power of the Supreme Court to determine what are essentially issues of national policy.

Since this doctrine represents an important addition to our constitutional law, the cases in which it was applied may appropriately be grouped together and discussed at the outset of this review.

## A. QUESTIONS OF NATIONAL POWER

### I. NATIONAL POWERS AND THE TENTH AMENDMENT: "DUAL FEDERALISM"

1. *The A.A.A. Case.* The first case to rest upon the doctrine of dual federalism was the famous case of United States v. Butler,[5] invalidating the A.A.A. This case was spectacular both in the novelty of its constitutional doctrine and in the importance of its result. In it the Court, by a six to three decision, held void the Agricultural Adjustment Act of 1933. This important legislation had sought to meet the basic problem confronting the American farmer—low prices of farm products. For twenty years, farm prices had been falling steadily while prices of the goods which the farmer must buy had either risen or dropped much less sharply. American agriculture had reached a point where the normal farm income was not enough to run the farms and maintain a decent standard of living. Furthermore, the widespread inability of American farmers to buy goods had a depressing effect upon the whole economic structure. The Agricultural Adjustment Act had for its central purpose the raising of the level of farm prices, and the consequent restoration of the farmer's purchasing power. Its declared object was to restore farm prices to the prewar level prevailing from 1910 to 1914. This was to be done by persuading farmers to reduce their production of basic agricultural products sufficiently to bring about the desired increase in the prices of farm commodities. The farmers who agreed to reduce their production were to be paid by the government, for doing so, enough to make up the loss. These payments were to be made from funds raised by processing taxes levied upon industries which prepared farm products for the market. Floor

[4] See his dissenting opinion in United States v. Constantine, 296 U.S. 287, 1935.
[5] 297 U.S. 1, 1936.

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taxes were also levied upon existing stocks of goods which would have been subject to processing taxes had the law been effective earlier. All of these complicated arrangements were to be worked out in detail through rules and regulations to be issued by the Secretary of Agriculture, who also had power to make marketing agreements and had other subsidiary authority.

Attack upon the validity of the act was made by a Massachusetts corporation which sought to escape the payment of processing and floor taxes. The majority opinion of the Court invalidating the statute, written by Mr. Justice Roberts, ran along the following lines:

First, the processing taxes are not legitimate exercises of the federal taxing power, since they are levied in order to finance a system of regulating agriculture over which Congress has no power. Clearly, the processing taxes were levied to raise revenue—in fact, a great deal of revenue. They brought into the Treasury something more than a billion dollars. In what respect, then, did they fail to meet the test of an ordinary tax for revenue purposes? The Court's answer is that these taxes are an integral and essential part of the complicated scheme for agricultural adjustment comprising the basic purpose of the act. This is a significant and novel limitation upon the power of federal taxation. It had been held in other cases, notably the Child Labor Tax Case,[6] that a federal tax may be in reality not a tax if, by its destructive rates, it is in essence a penalty. By no sort of logic could the processing taxes be classified as fiscal penalties. Their invalidity as taxes lies in the fact that the money which they bring in is to be used to pay for a scheme of regulation lying outside the scope of federal authority. Mr. Justice Roberts refers to them as "expropriations of money from one group for the benefit of another."

Second, the processing taxes cannot be upheld on the ground that Congress is here exercising its delegated power to lay and collect taxes "for the common defense and general welfare" of the United States. It is admitted that a federal taxing statute, even if it is not a bona fide exercise of the taxing power, may be valid if it is a reasonable means for carrying into effect some other delegated power of Congress. It was urged, accordingly, that the processing taxes were aids to the exercise of the granted power of spending money for the public welfare. The majority opinion gives us for the first time an authoritative interpretation of the general welfare, or spending, clause. It is briefly this. The phrase "the general welfare" states the purpose for which money raised by federal taxation may be spent. It is not an independent grant of broad power, unconnected with taxation, to promote the general welfare. Nor does the Court adopt the narrower interpretation that the phrase "general welfare" must be

[6] Bailey v. Drexel Furniture Co., 259 U.S. 20, 1922.

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interpreted to include only the objects falling squarely within the delegated powers of Congress. Under this clause, Congress may tax in order to raise money to be used in promoting a broad national public welfare. Thus far, the opinion seems to be moving in the direction of sustaining the processing taxes unless the Court is willing to decide that the rehabilitation of American agriculture is not an object falling within the scope of the national general welfare. The Court avoids making so shocking a statement by adroitly evading the issue. Having discussed at length what the general welfare clause means, Mr. Justice Roberts states that the Court is not required to determine whether an appropriation in aid of agriculture falls within it, inasmuch as the whole act is void as an invasion of the reserved powers of the states. This brings him squarely to the doctrine of "dual federalism," which he develops at length. Even if the processing taxes are bona fide taxes, and even if the appropriations to aid farmers are made for the general welfare, the fact is nevertheless bad, because the general objective, namely, the rehabilitation and regulation of the agricultural industry, lies within the field of the reserved powers of the states. There is an extensive elaboration of the theory that the granted powers of Congress may not be used for purposes lying within the field of state reserved power. There is a logical difficulty with this doctrine which the Court does not bother to consider. The reserved powers of the states are by definition those powers which have not been granted to the federal government or prohibited to the states. How this body of state power, clearly defined as a residuum of powers not granted, can operate as a limitation upon the very grants of federal power from which it is left over is not made clear. If Congress is actually exercising one of its delegated powers, then, by definition, it cannot possibly be exercising a power reserved to the states. This, however, does not disturb the majority of the Court.

Third, the system of crop reduction benefit payments provided for in the act is, in essence, coercive in character and is therefore a system of regulation falling under the "dual federalism" ban. It had been urged that while Congress might not impose mandatory control upon farmers it was not doing so under the act, but was merely making voluntary agreements which involved the spending of federal funds. Almost from the beginning, Congress has appropriated money for the widest variety of purposes and has, in many cases, made this appropriation of money contingent upon the recipient's doing things which the federal government had no direct authority to command. In short, the argument of the Court, as developed thus far, seems to cut the ground from under pretty much all of our federal grant-in-aid legislation. The majority undertakes to avert any such sweeping consequences of its decision by emphasizing what it regards as the coercive character of the crop benefit payments.

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This coercive character arises from the fact that the ordinary farmer cannot afford to pass up so profitable a bargain. This coercive element is said to be lacking in the other varieties of federal subsidies. Mr. Justice Roberts concludes his opinion by a resort to *reductio ad absurdum*. If Congress, through the conditional expenditure of money raised by taxation, may control American agriculture, what, if anything, is left which it may not control? This point is developed with numerous illustrations and with much fervor.

A powerful dissenting opinion was written by Mr. Justice Stone and concurred in by Justices Brandeis and Cardozo. This opinion makes the following points: First, under the principles of sound constitutional construction, the Court is not entitled to invalidate a law because it is unwise. "While unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint." Second, the processing taxes are ordinary and legitimate excise taxes levied by Congress. Third, the promotion of American agriculture is an object falling safely within the broad concept of the general welfare. Fourth, the payments made to farmers, while profitable to them, cannot be regarded as amounting to a coercive system of regulation. Finally, the fears expressed in the majority opinion, that the spending power of Congress, if upheld in this case, will be so abused as to obliterate the essential lines of our federal system, leads Mr. Justice Stone to remark: "The suggestion that it [the delegated power to spend] must now be curtailed by judicial fiat because it may be abused by unwise use hardly rises to the dignity of argument. So may judicial power be abused . . . Tortured construction of the Constitution is not to be justified by recourse to extreme examples of reckless congressional spending which might occur if courts could not prevent expenditures which, even if they could be thought to effect any national purpose, would be possible only by action of a legislature lost to all sense of public responsibility."

It is clear from the decision in the A.A.A. case that the Bankhead Cotton Act, the Tobacco Act, and the Potato Act were also unconstitutional. In these three laws, Congress did not rely upon voluntary crop reduction agreements, but provided for compulsory crop reduction through the means of destructive taxation supported by criminal penalties. After the decision in the Butler case, these three statutes were, accordingly, repealed.

Some weeks after the decision in the Butler case, the Court held in Rickert Rice Mills v. Fontenot[7] that the invalidity of the Agricultural Adjustment Act was not corrected by the amendatory act of 1935 which

[7] 297 U.S. 110, 1936.

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had primarily sought to protect the statute against the charge that it improperly delegated legislative power. The Court also ordered that taxes which had been paid under the act and which had been impounded pending the decision of the Court should be returned forthwith without reference to any procedural machinery for recovery established in the act itself.

2. *The Municipal Bankruptcy Act Case.* The doctrine of "dual federalism" was invoked also to invalidate the Municipal Bankruptcy Act of 1934. This was an amendment to the general bankruptcy law. It made it possible for any municipality or other political subdivision of a state, if it had become insolvent, to secure in a federal district court a readjustment of its assets and liabilities. It might, in short, go through bankruptcy. The formal consent of the state was made necessary to the operation of the act within its borders, and the consent of a certain proportion of the creditors of the municipality was required in each particular case. The act sought to provide relief for a very acute problem. During the depression, municipalities had found it impossible to make normal tax collections. In January, 1934, more than two thousand cities and other local governmental units were insolvent. Most of these had borrowed heavily and were receiving very little revenue. Their creditors had no means of relief, since there was no property available to satisfy a judgment even if it were secured. In many cases, most of the creditors were willing to scale down the debts in order to secure something, but no such reduction of debt obligations could be enforced over the objection of even a very small minority of the creditors, without impairing the obligation of contracts. The federal act sought to provide a way out of this difficulty. In Ashton v. Cameron County Water Improvement District,[8] it was held to be unconstitutional. The Water District had issued $800,000 worth of six per cent bonds, and had no assets. It proposed to take advantage of the Municipal Bankruptcy Act to borrow enough money from the Reconstruction Finance Corporation at four per cent to pay fifty cents on the dollar and write off the rest of the obligation. In a five-to-four decision, the majority, speaking through Mr. Justice McReynolds, held that the act was void as an exercise of the delegated federal power to regulate bankruptcy in such a way as to invade the reserved powers of the states. The Court did not deny that the power exercised was the bankruptcy power. The invalidity of the act resulted from the purpose for which the power was used. There is discussion of the resulting infringement of the sovereign authority of the states to regulate the affairs of their municipalities, and the disturbance of the normal equilibrium between state and federal power. A dissenting opinion by Mr. Justice

[8] 298 U.S. 513, 1936.

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Cardozo, with whom Chief Justice Hughes and Justices Brandeis and Stone concurred, pointed out that the sovereign power of a state can hardly be said to be impaired if the operation of the federal statute within its limits is made dependent upon the formal consent of the state. The dissenting justices agreed that an involuntary municipal bankruptcy act would be void, but insisted that all state interests were adequately protected by the statute.

In Hopkins Federal Savings and Loan Association v. Cleary,[9] the Court again invoked the Tenth Amendment to invalidate an exercise of federal power. The case does not involve the doctrine of "dual federalism," but presents a fairly close analogy to it. The Federal Home Owners Loan Act of 1933 provided, amongst other things, that any state building and loan association which had become a member of a federal home loan bank by subscribing to its shares might convert itself into a federal savings and loan association upon the vote of a bare majority of its members and without the consent of the state that created it. The act provided, in short, that a state corporation might, without the consent of the state which created it, become a federal corporation. In a unanimous opinion written by Mr. Justice Cardozo, this was held to be "an illegitimate encroachment by the government of the nation upon a domain of activity set apart by the Constitution as the province of the states." There is careful analysis of the legal nature of corporations and of the vital interest which a state has in all questions connected with their formation and the functions which they are permitted to carry on. The authority of the state over such corporations is a part of its sovereignty or "quasi-sovereignty." The Court does not pass upon the question of whether Congress has the power to create building and loan associations, or to convert such associations, once created, into corporations. It confines itself to holding that the federal government may not exercise power in this field over corporations which the state has created. The doctrine of the case does not apply to situations in which the federal government is exercising, as under the commerce clause, a power which is not only a delegated power but an exclusive power; for no one can contend that the authority to create building and loan corporations is vested in Congress exclusively, assuming that Congress enjoys the power at all.

## II. COMMERCE POWER

The Guffey Coal Act was invalidated by a six-to-three decision in the case of Carter v. The Carter Coal Company.[10] This act, known as the Bituminous Coal Conservation Act of 1935 had undertaken to stabilize the soft coal industry after the Bituminous Coal Code had gone down

[9] 296 U.S. 315, 1935.

[10] 298 U.S. 238, 1936.

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with the constitutional wreckage of the N.R.A. decision. The deplorable laboring conditions in the soft coal industry, and the cut-throat competitive practices under which soft coal is mined, are matters of common knowledge. The Guffey Act sought to do two major things: first, to establish satisfactory working conditions in the industry; second, to stabilize prices in such a way as to prevent cut-throat competition and provide a basis for fair wage payments. A Bituminous Coal Commission was created, with authority to formulate a working agreement in the nature of a coal code. Under the provisions of this code, as administered by the Commission, the price of coal was to be fixed, while the wages and hours of labor of the miners were to be regulated and their right to bargain collectively protected. A tax of 15 per cent was levied on the sale price of coal at the mine. Any producer, however, who filed an acceptance of the coal code established by the Commission was entitled to a drawback of 90 per cent of the tax imposed. Thus a code of fair competition was to be established by a technique wholly different from that used in the N.R.A.

The opinion of Mr. Justice Sutherland, speaking for the majority, may be summarized thus: First, it is apparent, and in fact it was admitted by counsel for the government, that the tax imposed by the act is a penalty rather than an exercise of the delegated power of taxation. This, however, does not make it invalid if it can be shown that such a fiscal penalty is being used in aid of some other delegated federal power. The government frankly admitted that the excise tax could be held valid only on the ground that it was a legitimate means of exercising the commerce power. If the Guffey Act could not be sustained under the commerce clause, it certainly could not be sustained under the taxing clause. With all of this the Court agreed. Second, Mr. Justice Sutherland turns to an examination of the theory that the Guffey Act could be sustained as a measure to promote the general welfare. The preamble to the act had stated that this was one of its purposes; but the briefs for the government had not advanced any such theory as part of the constitutional argument. The majority opinion, however, expounds with lucidity and thoroughness the unsoundness of the doctrine that the federal government has inherent power to deal with all problems affecting the nation as a whole, and has in this way a general and undefined power to promote the general welfare. This theory had been sponsored by President Theodore Roosevelt and dubbed the "New Nationalism." It had been presented to the Court by the Attorney-General in the case of Kansas v. Colorado,[11] and Mr. Justice Brewer had disposed of the doctrine in a trenchant paragraph. The present opinion reviews this whole problem elaborately and repudi-

[11] 206 U.S. 46, 1907.

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ates the theory that the national government enjoys any undelegated inherent powers, except perhaps in the field of international relations. Third, the act is not a legitimate exercise of the power to regulate interstate commerce, inasmuch as it undertakes to regulate the conditions of labor in the mining industry. The Court emphasizes that a line exists between the production of goods and the later shipment of those goods through the channels of interstate commerce. To regulate the conditions of labor is to regulate local and intrastate affairs. This Congress has no power to do. Reference is made to the distinction drawn in the N.R.A. decision between those conditions and transactions which affect interstate commerce directly and those which affect it indirectly. The Court concludes that the labor provisions of the Guffey Act are not regulations of interstate commerce and are, therefore, void. Fourth, even if the labor provisions of the act were valid under the commerce power, they are, nevertheless, violations of the due process clause of the Fifth Amendment, since they arbitrarily delegate legislative power to representatives of the industry to make binding regulations in the form of a code. This objection was directed to the sections of the act providing the machinery for the fixing of maximum hours of labor and minimum wages. In the language of the Court: "This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." Fifth, the labor provisions of the Guffey Act are so intimately tied up with the price-fixing provisions of the act, which were not before the Court in this case, that the entire statute must be held void. The Court does not pass squarely upon the validity of the price-fixing provisions. They would, in all probability, be upheld on their merits. In spite of the declaration of separability found in the act itself, the invalidity of the labor sections is held to vitiate the entire statute. At this point there is perhaps the most elaborate examination of the problem of the partial invalidity of statutes to be found anywhere in the reports.

A vigorous dissenting opinion was written by Mr. Justice Cardozo and concurred in by Justices Brandeis and Stone. They held that the price-fixing provisions of the Guffey Act were valid regulations of interstate commerce, and that they were sharply separable from the labor provisions. They urged that the question of the validity of the labor provisions had been improperly and prematurely raised, since the complainant, not having complied with the provisions of the code, had not been injured thereby. Chief Justice Hughes concurred with the majority of the Court in holding the labor provisions of the act void. He believed however, that the price-fixing provisions of the act were valid regulations of commerce and were separable from the labor provisions.

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In 1929, Congress passed the Hawes-Cooper Convict-made Goods Act, which was to become effective in five years. This act, patterned after the Wilson Act of 1890 and the Oleomargarine Act of 1902, provided that prison-made goods transported into any state to be used or sold therein, should be subject to the laws of the state upon arrival therein in the same manner as though they had been produced in the state, and "shall not be exempt therefrom by reason of being introduced in the original package or otherwise." In 1933, Ohio passed a law prohibiting the sale of prison-made goods in the open market. In the case of Whitfield v. Ohio,[12] the Supreme Court unanimously sustained the validity of the federal act and also the prohibitory act of the state of Ohio. The case presented no new issues. The Ohio statute is valid. It does not violate the comity clause guaranteeing the privileges and immunities of the citizens in the several states, since it is not discriminatory. The citizens of Ohio are under the same disability to sell prison-made goods as are the citizens of other states trying to bring them in from outside. Furthermore, "the view of the state of Ohio that the sale of convict-made goods in competition with the products of free labor is an evil finds ample support in fact and in the similar legislation of a preponderant number of the other states. Acts of Congress relating to the subject also recognize the evil." The federal statute itself, which divests prison-made goods moving in interstate commerce of their character as articles of interstate commerce while still in the original package, is sustained on the authority of the case of *In re* Rahrer[13] upholding the Wilson Act of 1890.

While the Whitfield case does not make any new constitutional law, it suggests interesting possibilities for the extension of an established principle. It seems obvious that if this type of legislation may be passed affecting convict-made goods, it may also be passed with respect to goods made by child labor. Furthermore, if Congress may authorize the states to exercise police power over prison-made goods or child-made goods which have been divested of their character as articles of interstate commerce by the provisions of an act like this, it could probably go still further and forbid directly, as it did in the Webb-Kenyon Act and in the Reed Amendment, the shipment in interstate commerce of goods intended to violate the local police regulations of the states. The legislative technique sustained in the Whitfield case has, accordingly, been actively urged as a means of extending federal control over child labor in view of the failure thus far of the ratification of the Child Labor Amendment.

The case of United States v. California[14] holds that the Federal Safety Appliance Act may be validly enforced against a railroad owned by the state of California and engaging in interstate commerce. Mr. Justice

[12] 297 U.S. 431, 1936. [13] 140 U.S. 545, 1891. [14] 297 U.S. 175, 1936.

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Stone wrote the unanimous opinion of the Court. The state contended that it was operating the railroad without profit for the purpose of facilitating the commerce of the port of San Francisco and that it was, therefore, engaging in its sovereign capacity in a public function. Had the federal statute undertaken to tax the state-owned railroad, this argument would have had relevance. But the situation is different when Congress is exercising the exclusive grant of power to regulate commerce. The Court draws a careful distinction between the present case and those in which state instrumentalities have been kept free from state taxation. This point is worth quotation. "The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies, is not illuminating. That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power (see Metcalf & Eddy v. Mitchell, 269 U. S. 514, 522–524), which would be unduly curtailed if either, by extending its activities, could withdraw from the taxing power of the other subjects of taxation traditionally within it. Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual."[15]

### III. TAXATION

The question when is a tax not a tax was raised again in the case of United States v. Constantine,[16] and again the Court invalidated a federal taxing statute on the ground that it imposed a penalty rather than a tax. The act involved was a provision of the Revenue Act of 1926, which imposed a $25 excise tax on all retail liquor dealers, and then imposed a special excise tax of $1,000 on such dealers when they carry on the business of selling liquor contrary to the law of the state or municipality. Fine and imprisonment are provided for failure to pay this special tax. Mr. Justice Roberts, speaking for six members of the Court, holds that this

[15] The so-called Lindbergh Act of 1932, as amended in 1934, was interpreted and enforced in the case of Gooch v. United States, 297 U.S. 124, 1936. The Court did not pass squarely upon the validity of this federal kidnapping act, inasmuch as no attack seems to have been made upon its constitutionality. The Court held, however, that an officer who is unlawfully seized and carried away to prevent the arrest of his captors is "held for reward or otherwise" within the meaning of the act. The conviction of Gooch for this offense was accordingly sustained.

[16] 296 U.S., 287, 1935.

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$1,000 tax is not a tax, but is a penalty for the violation of state law and as such is an invasion of the reserved powers of the states. It is admitted that the provision was valid as long as the Eighteenth Amendment was in force, since Congress under that amendment had full power to enforce national prohibition and impose penalties for violation of the law. The repeal of the Eighteenth Amendment has withdrawn that federal power. The tax in question bears all the earmarks of a penalty. It is imposed only upon those who are engaged in committing a crime. The amount of it is exorbitant when viewed from the standpoint of normal taxing policy. The conclusion follows that the purpose of the act is to punish and deter unlawful conduct.

Mr. Justice Cardozo, with whom Justices Brandeis and Stone concurred, dissented. He attacked the inference of the majority that the act must be regarded as a penal regulation. Congress may have had wholly adequate reasons for imposing a higher tax upon bootleggers than upon those engaged in the lawful sale of liquor. It may have believed that an illegal and furtive business would be more profitable than one openly and lawfully conducted. It may also have believed "that the furtive character of the business would increase the difficulty and expense of the process of tax collection." Congress is well within its rights in classifying businesses into those which are lawful and those which involve trading in contraband goods, and may properly impose a higher tax upon the latter. The dissent closes with a sharp attack upon the practice of resting the constitutionality of a congressional act upon what the Court conceives to be the purpose of Congress in passing it. "The judgment of the Court, if I interpret the reasoning aright, does not rest upon a ruling that Congress would have gone beyond its power if the purpose that it professed was the purpose truly cherished. The judgment of the Court rests upon the rule that another purpose, not professed, may be read beneath the surface, and by the purpose so imputed the statute is destroyed. Thus the process of psycho-analysis has spread to unaccustomed fields. There is a wise and ancient doctrine that the Court will not inquire into the motives of a legislative body or assume them to be wrongful . . . I cannot rid myself of the conviction that in the imputation to the lawmakers of a purpose not professed, this statutory rule of caution is now forgotten or neglected after all the many protestations of its cogency and virtue."

### IV. DISPOSAL OF FEDERAL PROPERTY: THE T.V.A. CASE

In Ashwander v. Tennessee Valley Authority,[17] the Court passed upon the validity of certain narrow phases of the government's vast and diversified enterprise in the Tennessee Valley. In 1916, Congress authorized the

[17] 297 U.S. 288, 1936.

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construction of the Wilson Dam on the Tennessee River in order to generate power for the production of nitrates and other munitions of war. The plant was not finished until 1926, and for some time thereafter it was impossible to reach an agreement as to whether the government should itself operate the enterprise or lease it to private interests. In 1933, the Tennessee Valley Authority was created. This is a government corporation vested with wide and varied powers for developing and selling hydro-electric energy and engaging in a multitude of activities incidental thereto. The T.V.A. embarked upon a broad program of building dams, producing power, purchasing and building transmission lines, selling electric current, manufacturing and selling electrical applicances, and supervising the social and economic welfare of the people, mostly federal employees, in the Tennessee Valley. Part of the T.V.A. policy was to provide a "yardstick" by which the actual cost of producing and selling power could be accurately measured. This was expected to be helpful in the governmental regulation of rates charged by private power companies. In 1934, the Tennessee Valley Authority made an agreement with the Alabama Power Company for the purchase of certain transmission lines and other property. The contract provided for an interchange of hydro-electric energy, a sale by the T.V.A. to the company of some of its surplus power, and a division of the territory within which each was to sell electric current. Ashwander, as one of the stockholders of the power company, sought to enjoin the enforcement of the contract on the ground that the entire T.V.A. enterprise, including the specific contract provisions in question, was beyond the constitutional authority of the federal government.

In an opinion from which Mr. Justice McReynolds alone dissented, the Court upheld the power of the T.V.A. to make and enforce the contract in question. The Court declined to pass upon the validity of the large number of spectacular activities in which the T.V.A. was engaged but which were not involved in the actual case before the Court. The opinion of Chief Justice Hughes emphasized three points. First, under its war power, Congress could validly provide for the construction of dams and of hydro-electric plants, and the production of electrical energy. Second, the building of the Wilson Dam can also be grounded upon the power of Congress to improve the navigability of streams as an incident to its authority to regulate commerce. Third, the Constitution specifically grants to Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." This power is broad and general. It permits the government to dispose of surplus electrical energy by sale or lease. Earlier cases had upheld the government in the sale or lease of minerals found on public lands. The government is, accordingly, well within its rights in putting upon the market the hydro-electric energy which it does not need

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for governmental purposes. Whether there are limitations upon the government's power to compete in the open market with private power companies is not discussed.

### V. THE BILL OF RIGHTS—ADMINISTRATIVE PROCEDURE AND DUE PROCESS

It is a well-established doctrine in our constitutional law that the findings and decisions of administrative officers and agencies which affect private rights must be subject to review by the courts. The precise scope of this review, and particularly the extent to which administrative determinations of fact may be made final, has presented many problems of great difficulty. Court decisions in this field have been governed quite as often by the practical necessities arising out of specific situations as by any logically consistent body of principles which can be called an administrative law. It is settled that the rulings of administrative officers upon questions of law must be subject to judicial scrutiny in order to meet the test of due process. In Crowell v. Benson,[18] a divided Court declared that the findings of administrative officers upon what may be termed jurisdictional facts must also be subject to court review. Jurisdictional facts are those facts upon the existence of which the authority of the officer to act rests. There has been much confusion and conflict, however, as to the finality of the other varieties of fact-finding in which our administrative agencies engage.

A notable limitation upon the final authority of administrative officers to determine facts is established in St. Joseph Stockyards Company v. United States.[19] While the doctrine of the case is perhaps not new, the decision itself represents a sharpening and clarification of judicial thinking upon the question, even if it does not produce a clarification of our administrative law. The case arose under the Packers and Stockyards Act of 1921. The Secretary of Agriculture, as authorized by the statute, issued an order fixing rates and services rendered in stockyards. The order was based upon an elaborate examination of evidence. The district court took the position that the Secretary's findings of fact, supported by evidence, were conclusive, although the court itself did apparently examine the record thoroughly and agreed with the Secretary's conclusion. The issue presented to the Supreme Court was that of the finality of the Secretary's conclusion as to the facts. The Court was unanimous in upholding the validity of the Secretary's order, but there was sharp disagreement on the issue just stated. A majority of the Court, speaking through Chief Justice Hughes, held that due process of law requires a judicial scrutiny of findings of fact made by administrative officers when those findings of

[18] 285 U.S. 22, 1932.

[19] 298 U.S. 38, 1936.

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fact are necessary to the determination of constitutional rights. The rate fixed by the Secretary must, in order to be valid, be non-confiscatory. Whether or not it is confiscatory depends, in the last analysis, upon the facts disclosed as to such matters as net income and valuation. To allow the Secretary the last word in determining these facts is essentially permitting him to settle the basic constitutional question involved. In a concurring opinion with which Justices Stone and Cardozo agreed, Mr. Justice Brandeis argues that the findings of fact made by the Secretary should be regarded as final if they are supported by evidence and if the procedure followed was fair.

The case of Morgan v. United States[20] holds that it is essential to due process of law that the Secretary of Agriculture, in fixing a rate under the Packers and Stockyards Act, shall himself examine the evidence, hear the arguments, and consider the briefs upon which the rate order rests. In this case, the Secretary issued the rate order, but did not personally conduct the hearing upon which it was based. The hearing was held by an assistant secretary who, on the basis of evidence and argument, found the essential facts. The two officers consulted together and the Secretary issued the order. This is held to deny due process, since the requirements of fair procedure demand that a decision upon substantial rights be made only by one who has personally considered the evidence and the arguments. The Court emphasizes that this does not preclude any device which will aid the officer making the decision by putting at his disposal the advice and counsel of subordinates. The duty, however, "is akin to that of a judge. The one who decides must hear." The case did not raise any issue of the delegation by the Secretary to a subordinate of the power to issue an order, inasmuch as the assistant secretary in this case did not himself undertake to issue the order in question.

An important case affecting the powers and procedure of the Securities and Exchange Commission is that of Jones v. Securities and Exchange Commission.[21] Under the Securities and Exchange Act, securities sold upon registered exchanges must be registered with the Commission. There is first an application to register the securities, accompanied by an elaborate factual statement, and when this application has been acted upon favorably the registration becomes effective. Jones had applied for the registration of certain securities. The day before his registration statement would have become effective under the law, the Commission began a proceeding challenging the correctness of the statements filed and ordered Jones to appear at a hearing some weeks later to show cause why a stop order should not issue suspending the registration of the securities. Jones

[20] 298 U.S. 468, 1936.

[21] 298 U.S. 1, 1936.

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thereupon gave formal notice that he withdrew his statement and application, and declined to obey the order to appear at the hearing. This presented to the Court two questions: first, could Jones, under the law, validly withdraw his application for registration?; second, did the Commission have authority to compel Jones to testify at a hearing after his withdrawal of registration?

In a six-to-three decision, the Court upheld the right to withdraw the registration and denied the power of the Commission to pursue the subsequent investigation. Speaking through Mr. Justice Sutherland, the Court held that the right to withdraw, which was nowhere specifically defined in the statute, must be presumed to exist in the absence of express provisions to the contrary. "We are unable to see how any right of the general public can be affected by the withdrawal of such an application before it has gone into effect." The withdrawal of the registration put an end to the Commission's power of investigation. Its power to hold a hearing and compel testimony is incidental to its authority to issue stop orders against registered securities. Since Jones has withdrawn his registration, the power to issue a stop order no longer exists in his case, and he has, accordingly, placed himself outside the range of the Commission's power of inquiry. The Court rules out, with some eloquence, the existence of any general power of investigation in the Commission. It likens any such general power to the power to issue a search warrant not based upon specific statements of fact and suggests a parallel with the "intolerable abuse of the Star Chamber."

Mr. Justice Cardozo dissented in an opinion in which Justices Brandeis and Stone concurred. He declared that the statute was wrongly interpreted in permitting the voluntary withdrawal of a registration statement against which formal charges have been made by the Commission. "To permit an offending registrant to stifle an inquiry by precipitate retreat on the eve of his exposure is to give immunity to guilt; to encourage falsehood and evasion; to invite the cunning and unscrupulous to gamble with detection . . . . The statute and its sanctions become the sport of clever knaves." He upheld, in the second place, the authority of the Commission to go forward with its inquiry, and ridiculed the notion that the orderly holding of such an investigation under the terms of the statute is an invasion of constitutional rights. "A Commission which is without coercive powers, which cannot arrest or amerce or imprison, though a crime has been uncovered, or even punish for contempt, but can only inquire and report, the propriety of every question in the course of the inquiry being subject to the supervision of the ordinary courts of justice, is likened with denunciatory fervor to the Star Chamber of the Stuarts. Historians may find hyperbole in the sanguinary simile."

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## B. QUESTIONS OF STATE POWER

### I. THE FOURTEENTH AMENDMENT

#### 1. *Due Process of Law*

(*a*) *Due Process and State Police Power—The Minimum Wage Case.* The Supreme Court's decision in the New York minimum wage case has provided more effective ammunition for those who are seeking to curb the power of the Court than any decision handed down in recent years. In the case of Adkins v. Children's Hospital,[22] decided in 1923, the Court, by a five-to-three vote, with Mr. Justice Brandeis not sitting, held the District of Columbia minimum wage law applicable to women and children to be a denial of the due process of law clause of the Fifth Amendment. The Court later followed this case in refusing to review by certiorari the decisions of state supreme courts holding similar state legislation void under the Fourteenth Amendment. There had been, however, within the decade much progress in the field of social legislation; and also a growing feeling that if the minimum wage issue could be squarely presented again, the Supreme Court would find a way to sustain such legislation. In 1933, the state of New York passed a minimum wage law. This applied to women and children in trade and industry. It declared it to be contrary to public policy to employ any one at an oppressive and unreasonable wage. It defined an oppressive and unreasonable wage as one which is "both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health." A fair wage was defined as one "fairly and reasonably commensurate with the value of the service or class of service rendered." Provision was made for the administration of these wage standards through wage boards appointed by the Commissioner of Labor; and when minimum wages had been set up by these boards, failure to comply with them was made a misdemeanor punishable by fine and imprisonment.

The validity of the New York statute came before the Supreme Court in the case of Morehead v. New York *ex rel.* Tipaldo.[23] The court of appeals of New York had held the statute void on the authority of the Adkins case. The Supreme Court, by a five-to-four decision, upheld the state court and invalidated the minimum wage law as a denial of due process of law. The majority opinion was written by Mr. Justice Butler. It proceeds along the following lines: First, the Court is not asked in this case to reëxamine the major issues decided in the Adkins case. The contention of the state of New York is that the New York statute is substantially different from the District of Columbia act involved in the earlier case,

[22] 261 U.S. 525, 1923.

[23] 298 U.S. 587, 1936.

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and for that reason may be upheld without reviewing the Court's previous decision. Second, the New York statute is not substantially different from the one previously held void. The minimum wage law invalidated in the Adkins case had set up as the standard for a minimum wage that it be sufficient to maintain a decent standard of living. In the New York statute, two standards are set up. One is the fair value of the fair service rendered. The other is the minimum cost of living. The addition of the standard of a fair value for service rendered does not essentially change the character of the act or make it constitutionally distinguishable from the District of Columbia statute. The New York act is, therefore, void on the authority of the Adkins case. Third, while the majority's argument so far suggests that a minimum wage statute could be drawn which would not rest upon the objectionable standard of cost of living, and which might, therefore, be valid, Mr. Justice Butler proceeds to blast this hope by pointing out that the Adkins Act had established "that the state is without power by any form of legislation to prohibit or nullify contracts between employers and adult women workers as to the amount of wages to be paid." He goes on to explain that while the standard used in the District of Columbia law was arbitrary, it would have made no essential difference had it not been arbitary, since there is a complete absence of valid authority to regulate wage contracts by any standard whatever. Fourth, the argument that the New York act may be distinguished from the earlier statute on the basis of changed economic and social conditions is summarily disposed of. There are no substantial reasons for regulating the wages of women which do not apply with equal force to regulation of the wages of men, and it is obvious that the majority of the Court remain unshaken in their view that minimum wage legislation is an arbitrary denial of due process of law under any and all circumstances.

Chief Justice Hughes filed a dissenting opinion resting upon two grounds. He urged, in the first place, that the New York statute was substantially different from the one held void in the Adkins case by reason of the incorporation in it of the requirement that minimum wages must conform to the fair value of the service rendered. In the second place, he adds: "and I can find nothing in the federal constitution which denies to the state the power to protect women from being exploited by over-reaching employers through the refusal of a fair wage as defined in the New York statute and ascertained in a reasonable manner by competent authority." Justices Brandeis, Stone, and Cardozo concurred in this opinion.

Mr. Justice Stone, however, filed a separate dissenting opinion in which Justices Brandeis and Cardozo concurred. This opinion ran as follows: In the first place, "I attach little importance to the fact that the earlier statute was aimed only at a starvation wage and that the present one does not prohibit such a wage unless it is also less than the reasonable

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value of service." Second, the power to pass reasonable minimum wage legislation for women and minors falls well within the police power of the state. It is not forbidden by "the vague and general pronouncement of the Fourteenth Amendment against deprivation of liberty without due process of law. Mr. Justice Stone adds: "It is difficult to imagine any grounds, other than our own personal economic predilections, for saying that the contract of employment is any the less an appropriate subject of legislation than are scores of others, in dealing with which this Court has held that legislatures may curtail individual freedom in the public interest."

(*b*) *Due Process of Law and Freedom of the Press.* The attempt of the late Senator Huey Long of Louisiana to stifle newspaper criticism in his state fell afoul of the due process clause of the Fourteenth Amendment in the case of Grosjean v. American Press Company.[24] A Louisiana statute of 1934 imposed a license tax of two per cent on the gross receipts derived from the sale of advertising by newspapers, magazines, and periodicals having a circulation of more than 2,000 copies per week. The tax applied also to advertisements through moving pictures. It was pointed out in the briefs that only thirteen newspapers out of a total of 163 in the state would be affected by the act, and that of these thirteen, twelve were "active in their objection to the dominant political group in the state, which group controlled the legislature and at whose dictates the legislature passed this law." The reference is, of course, to Senator Long's political machine. In an able opinion by Mr. Justice Sutherland, the Court unanimously holds that this tax is in substance and by intention an infringement upon the freedom of the press. A survey of early English history indicates that taxes upon publications had been a favorite device for restricting the freedom of the press, and the framers of the First Amendment, which protects the freedom of the press, undoubtedly had in mind this type of restraint as well as other forms of previous restraints on publication. It is now well established that the Fourteenth Amendment protects freedom of speech as a part of the liberty which the state may not abridge without due process of law. This was the holding in Near v. Minnesota.[25] There is no question here of the right of the state to impose upon newspapers within their jurisdiction any reasonable form of taxation. It is obvious, however, that the present statute does not operate, and is not intended to operate, as a revenue measure. Its purpose and effect is to restrain and control publication. "It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional

[24] 297 U.S. 233, 1936.

[25] 283 U.S. 697, 1931. For comment, see this REVIEW, Vol. 26, p. 270.

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guarantees. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

(*c*) *Due Process of Law and Criminal Procedure.* Brown v. Mississippi[26] holds that due process of law has been denied to a person convicted of murder upon the sole basis of confessions shown to have been extorted from the accused by officers of the state by means of torture. There was no dispute as to the gruesome facts of this case. The accused were Negroes charged with the murder of a white man. There was no conflict in the testimony of the witnesses, including the state officers who were present and responsible, that the defendants had been whipped until they agreed to sign the confessions drafted by the prosecuting officers and were threatened with renewal of the torture if they later retracted. The only substantial defense set up by the state was that the constitutional immunity from self-incrimination is not essential to due process of law. This, of course, had been established in Twining v. New Jersey.[27] Chief Justice Hughes, for a unanimous Court, points out that this is not a simple question of compulsory self-incrimination. He declares: "The state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' The state may abolish trial by jury. It may dispense with indictment by a grand jury and substitute complaint or information. But the freedom of the state in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand."

(*d*) *Due Process of Law in Taxation.* In Great Northern Railway Company v. Weeks,[28] a North Dakota property tax on the railroad was held void on the ground that it was excessive and, accordingly, denied due process of law. The Court divided six to three in the case. The majority opinion, written by Mr. Justice Butler, declares that the full and true value of the property is the amount which the owner would be entitled to receive as just compensation were the state or federal government taking it by eminent domain. The state law required assessment for purposes of taxation to be made on the basis of full and true value. The Court admits that the railroad was not subjected to any discrimination as against other property assessed for taxation in the state. It freely admits that the company is bearing no more than its proportionate share of the tax burden imposed by the state. The finding that the assessment is

[26] 297 U.S. 278, 1936.
[27] 211 U.S. 78, 1908.
[28] 297 U.S. 135, 1936.

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excessive is based entirely upon the ground that the state had not taken into acount, in valuing the property, the falling off in traffic earnings and the value of railroad properties due to the depression. "The board's failure to consider the enormous diminution in value of petitioner's property caused by the 1929 collapse and the progress of the depression is, within the principles of our decisions, the equivalent in law of intention to make a grossly excessive assessment for 1933 in disregard of petitioner's rights under the due process clause of the fourteenth amendment." In a dissenting opinion, in which Justices Brandeis and Cardozo concurred, Mr. Justice Stone insists that the only ground upon which the valuation of the railroad's property could be held to deny due process is by showing either that the assessment is discriminatory or that the company is being compelled to bear an undue share of the tax burden imposed on all property owners in the state. He points out that this is the first time in which the Court has set aside a tax as a denial of due process of law merely on the ground that the assessment on which it is computed is too high.

2. *Equal Protection of the Laws*

Two cases involving questions of equal protection of the laws arose under the New York Milk Control Act. In the first of these, Borden's Farm Products Company v. Ten Eyck,[29] attack was made on the provision of the statute permitting milk dealers not having "well advertised trade names" to sell milk at a price one cent per quart lower than those having such trade names. This was alleged to be an arbitrary classification amounting to a denial of equal protection. The provision was upheld in a five-to-four decision, Mr. Justice Roberts writing the majority opinion. The differential in question is an incident of the temporary price-fixing experiment upheld in Nebbia v. New York.[30] Evidence shows that the only way in which independent dealers can compete with large companies having well advertised trade names is to sell at a slightly lower price, and for many years prior to the enactment of the statute this had been the custom of the trade. A balance had been achieved, the advertised dealers gaining from their good will, the independent dealers from the lower price. To wipe out this differential and fix a uniform minimum price would immediately put the independent dealers at a serious competitive disadvantage. The legislature might properly take into account the differing situations of the two classes of dealers affected by the regulation. A brief dissenting opinion was written by Mr. Justice McReynolds and concurred in by Justices Van Devanter, Sutherland, and Butler. The opinion reiterated the views expressed in the dissent of the same justices in Nebbia v. New York and held that the present provision adds discrimination to

[29] 297 U.S. 251, 1936.

[30] 291 U.S. 502, 1934. For comment, see this REVIEW, Vol. 29, p. 45.

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the basic difficulty of want of due process. The companies having well advertised trade names are forbidden to compete on equal terms and "may suffer utter ruin solely because of good reputation, honestly acquired."

The same New York statute, in licensing dealers who do not have well advertised trade names to sell at the lower price, provided that the privilege should be extended only to those who had been continuously handling milk in a city of more than one million inhabitants since April 10, 1933. Independent dealers entering the business after the date named were obliged to sell at the higher price. In Mayflower Farms v. Ten Eyck,[31] the appellant entered business in the autumn of 1933. In a six-to-three decision, the Court, speaking through Mr. Justice Roberts, held that this is an arbitrary classification and a denial of the equal protection of the laws. It is pointed out that a firm coming newly into the business could not compete with the established independent dealers, because it is obliged to charge the higher price; nor can it compete with the well advertised dealers because of their established good will. It is, consequently, effectually barred from the business. The dissenting justices, Cardozo, Brandeis, and Stone, felt that the question of whether new dealers should be permitted to enjoy the price differential was one of policy, which should be left to the legislature.

### II. STATE POLICE POWER AND INTERSTATE COMMERCE

The problem of drawing the precise line at which state police regulations begin to burden or obstruct interstate commerce is, of course, a continuing one. During the year, it arose in three cases deserving brief comment. In Bayside Fish Flour Company v. Gentry,[32] a California statute required a license of persons engaged in canning fish or producing fish flour and forbade the permitting of any deterioration or waste of any fish taken in the waters of the state, or brought into the state, or the taking or receiving of more fish than can be used without deterioration or waste. There were further protections against depleting any species of fish. This act is held to be a reasonable exercise of the state's police power for the conservation of the supply of fish within the waters of the state. It does not interfere in any direct manner with the interstate business of the plaintiff, a concern which engages in the canning and reducing of fish for sale in interstate commerce; nor is the statute open to attack under the due process or equal protection clauses.

A very similar result is reached in Pacific States Box and Basket Company v. White.[33] Here the department of agriculture of Oregon, acting under a state statute, issued orders prescribing official standards for con-

[31] 297 U.S. 266, 1936.
[32] 297 U.S. 422, 1936.
[33] 296 U.S. 176, 1935.

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tainers for various horticultural products. Among these were the containers for raspberries and strawberries, which were specified in considerable detail. It was made unlawful to pack or transport for sale or to sell the fruit in containers which did not conform to this standard. The plaintiff is engaged in the business of manufacturing containers for berries different from those required by the act, and alleges that the state requirement conflicts with the standards set in federal legislation and also operates as a burden upon interstate commerce. The Court, speaking through Mr. Justice Brandeis, upholds the state regulations. It finds no conflict with the provisions of the federal Standard Baskets and Containers Act of 1916. It points out that the state requirement is not aimed at the importation or sale of fruit containers, but at their use, and that the effect of the regulation is purely local, taking place after the containers have been brought into the state.

Hartford Accident & Indemnity Company v. Illinois[34] upheld an Illinois statute forbidding persons, associations, or corporations to buy and sell farm produce on commission in the state unless licensed. The act contained various provisions against fraud and required a bond of $5,000. The mere fact that a commission merchant handles farm produce brought in or sent out across state lines is not sufficient to prevent the state from regulating the commission business carried on within its borders. Whatever effect the regulation has upon interstate commerce is indirect and incidental, and until Congress supplants it by its own legislation it remains effective. A federal statute of 1930 regulates produce commission merchants engaged in foreign and interstate commerce, but its provisions do not conflict with those of the Illinois act. It furthermore provides that "this act shall not abrogate nor nullify any other statute, whether state or federal, dealing with the same subjects as this act; but it is intended that all such statutes shall remain in full force and effect except in so far only as they are inconsistent herewith or repugnant hereto."

### III. STATE TAXATION AND INTERSTATE COMMERCE

There is continuing difficulty in determining the precise techniques by which a state may tax the right or franchise of a foreign corporation to do business within its borders when that corporation is engaged in both interstate and local business. The basic test is, of course, whether the state tax directly burdens interstate commerce. It is roughly accurate to say that in levying the tax, or measuring the value of the privileges for purposes of taxation, the state may use the net income derived from business done in the state as a standard, and is held in so doing not to burden interstate commerce. If, however, it attempts to use the gross income derived

[34] 298 U.S. 155, 1936.

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from business carried on in the state, both local and interstate, this has been fairly consistently held to be a direct burden upon the interstate commerce done. This problem was involved in four cases which may be mentioned. In Matson Navigation Company v. State Board of Equalization,[35] a California statute imposed a franchise tax on corporations doing business within the state at the rate of four per cent of the net income derived from intrastate or interstate business done within the state. This was held valid against the claim of the plaintiff that the tax could not be properly levied upon the 22 per cent of their business which was interstate and foreign. The Court, reiterating previous holdings, held that net income is a reasonable basis on which to compute the value of the right to carry on business within any state.

A similar result is reached in Norfolk and Western Railway Company v. North Carolina.[36] This case upheld a North Carolina tax upon the net income earned within the state by an interstate railway, as a means of apportioning the state's share of the total value of the system. This is held to be no burden upon interstate commerce and no denial of due process of law.

The state of Washington, in 1933, levied an occupation tax upon practically all persons engaged in any intrastate business. The tax was measured by a percentage of the gross income derived solely from the local business done, and did not undertake to tax the privilege of doing interstate business. The rate varied for different occupations, and was three per cent for telephone companies. In Pacific Telephone and Telegraph Company v. Tax Commission,[37] this tax was held valid against the contention of the company that its local and interstate business were so inextricably tied together that the company was unable to escape the payment of the local tax (assuming it wished to do so) by the abandonment of its local business. The Court found no burden upon the interstate business of the company and concluded: "No decision of this Court lends support to the proposition that an occupation tax upon local business otherwise valid must be void merely because the local and interstate branches are for some reason inseparable."

On the other hand, an occupation tax levied by the state of Washington, and measured by the gross receipts from radio broadcasting from stations within the state, is held to be an unconstitutional burden upon the interstate commerce carried on. This is the case of Fisher's Blend Station v. Tax Commission.[38]

In two cases, the familiar rule is applied that a state may impose upon those engaged in interstate commerce within its borders charges for actual services rendered by the state. The more important of these was the case

[35] 297 U.S. 441, 1936.
[36] 297 U.S. 682, 1936.
[37] 297 U.S. 403, 1936.
[38] 297 U.S. 650, 1936.

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of Clyde Mallory Lines v. Alabama.[39] Here the Alabama Dock Commission, as authorized by law, had imposed a fee of $7.50 on vessels of five hundred tons and over which entered the harbor at the port of Mobile. This fee was to cover the general expenses of policing the harbor, and particularly to prevent the fire risks produced by the discharge of oil into the harbor by vessels and manufacturing plants. The steamship company attacked the statute as being, first, a tonnage duty, and second, a burden on interstate commerce. Speaking through Mr. Justice Stone, the Court upheld the tax as against both of these objections. There is a useful discussion of the meaning of the constitutional prohibition against the imposition of a tonnage duty by any state. Such tonnage duties embrace "all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port. But it does not extend to charges made by state authority, even though graduated according to tonnage, for services rendered to and enjoyed by the vessel, such as pilotage, or charges for the use of locks on a navigable river, or fees for medical inspection." The fee imposed in the present case is not a charge for the use of the harbor, but is a reasonable levy to cover the cost of maintaining the safe and efficient use of harbor facilities. The fact that particular vessels are less in need of the service thus provided than others is irrelevant to the validity of the charge. By the same general argument, it is clear that no burden is being imposed upon interstate or foreign commerce. On the contrary, such commerce is being facilitated by the service which the state is rendering and for which it is making a clearly reasonable charge.

A New Mexico statute of 1935 denied the use of the highways of the state for the transportation of motor vehicles on their own wheels for the purpose of sale within or without the state, unless such vehicles are licensed by the state, or owned by a licensed dealer and operated under a dealer's license, or operated under a special permit for which a fee is charged. In Morf v. Bingaman,[40] these requirements were held not to obstruct interstate commerce, but to provide an essentially reasonable charge for the use of the highways of the state.

Another New Mexico statute imposed a tax of five cents per gallon on the sale and use of gasoline. Distributors, defined to include a corporation consuming and using in the state any motor fuel purchased in and brought from another state, were required to pay a license fee of $25 for each distributing station or place of business or agency. This law was held void as applied to bus lines doing only an interstate business, in the case of Bingaman v. Golden Eagle Western Lines.[41] The defendant was a Delaware

[39] 296 U.S. 261, 1935.
[40] 298 U.S. 407, 1936.
[41] 297 U.S. 626, 1936.

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corporation operating bus lines which did only interstate business in New Mexico. The Court suggested that if the taxes exacted merely a reasonable charge for the use of the highways they would be valid; but the state court had interpreted the act as imposing an excise tax, and on this construction it is plainly a direct burden upon interstate commerce.

### IV. STATE TAXATION OF FEDERAL INSTRUMENTALITIES

The range of immunity from state taxation extended to federal instrumentalities is pushed beyond previous holdings in Graves v. Texas Company.[42] An Alabama statute of 1935 required those distributing, refining, selling, or storing gasoline to pay an excise tax of six cents per gallon upon such distribution, sale, or storage. The defendant received gasoline through the channels of interstate commerce which it was under contract to sell to the United States government in the state of Alabama. This gasoline was stored in tanks within the state, subject to withdrawal under the terms of the agreement. The tax was exacted from the company on the amount of gas withdrawn from storage in the state at the time of its withdrawal, even though the gas was thereupon sold to the United States. The court, speaking through Mr. Justice Butler, held that this tax infringed the constitutional principle which safeguards the federal government against state taxation. The opinion states that the tax is a tax not upon the storage of the gasoline, but essentially upon its use or sale. Thus construed, it would fall under the rule of the Panhandle Oil Company case, forbidding the state taxation of sales to the national government. The Court further declares that even if the tax be regarded as a tax on the storage of the gasoline, it would be open to the same objections, since "a tax upon anything so essential to the sale of the gasoline to the United States is as objectionable as would be a tax upon the sale itself. The validity of the tax is to be determined by the practical effect of enforcement."

In a dissenting opinion concurred in by Mr. Justice Brandeis, Mr. Justice Cardozo insists that the tax is a tax upon storage alone and not upon sale, and emphasizes that this pushes the rule of immunity from state taxation far beyond the authority of the Panhandle Oil Company case. "If that ruling is to stand, it will equally forbid a tax upon the process of refining, or upon transportation to a market, since these, as much as storage, are preliminaries to sale. Not yet has the immunity of government from indirect obstruction been pushed to that extreme."

### V. IMPAIRMENT OF THE OBLIGATION OF CONTRACTS

Several cases during the present term involved the construction of the contract clause. In Treigle v. Acme Homestead Association,[43] a law of

[42] 298 U.S. 393, 1936.

[43] 297 U.S. 189, 1936.

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Louisiana had provided that stockholders of building and loan associations might withdraw as members upon proper notice, and receive back the amount of their investments and a share of the profits. There were detailed provisions as to the way in which these repayments were to be handled. In 1932, these arrangements were modified so as to permit the directors of the associations to use the available association funds for operating expenses, the payment of debts, and the creation of cash reserves for future dividends, before applying them to the payment of withdrawal claims. In short, in a variety of ways, the chance of the withdrawing stockholder to get his money back at all, and to get it back speedily, was limited by the new statute. This is held by the Court to impair the obligation of the contract arising under the earlier act, as well as to deprive the stockholder of his property without due process of law.

In Schenebeck v. McCrary,[44] an Arkansas statute of 1935 which released county treasurers and bondmen from liability in cases where public funds were lost by reason of the insolvency of a bank, and not through the defalcation of the county treasurer, was held not to impair the obligation of any contract. The Court held that no individual taxpayer had any vested interest in the public funds in question, and that no contract obligation surrounded the funds in such a way as to protect them from the change provided for in the statute.

A Louisiana statute provided for the lease of lands which had become the property of the state as a result of judgments for unpaid taxes. These leases contained the clause that the lease should come to an end in case the lands were redeemed by the former owner or sold by the state. In Violet Trapping Company v. Grace,[45] the company had leased such lands at a time when it was possible under the statutes for the former owners to redeem them only by the payment to the state of the full amount of the taxes due, plus penalty and interest. In 1934, it was provided by law that the former owner might redeem his land by payment, on an installment basis, of the actual taxes due. The Court held that this change in the circumstances under which the lessee of the state would have his lease terminated did not impair the contract embodied in the lease. The clause in the original lease making the land subject to redemption was clear and unambiguous, and left the state free to determine the exact terms upon which the land might be redeemed or sold.

[44] 298 U.S. 36, 1936.

[45] 297 U.S. 119, 1936.

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**State Constitutional Development in 1936.**[1] Something more aggressive than the laws of probability determined the fate of state constitutional amendments last year. Yea-sayers dominated nay-sayers in the ratio of three to two. Ninety amendments of the 158 under consideration in 35 states received the electoral imprimatur.[2] In this general mood of acceptance, only California was steadfastly negativistic, rejecting 16 of the 20 proposed changes. Louisianians, on the other hand, took practically all that was offered—with unselective enthusiasm approving 33 of the 34 amendments on their imposing ballots.

Two general trends—one positive, one negative—seem apparent. First, the passage in Colorado, Florida, Kansas, Louisiana, and Missouri of amendments necessary for state social security legislation indicate that the ray of social responsibility seen in Lloyd George's 1909 budget, somewhat refracted in its passage through the New Deal medium, and necessarily resolved by the prism of the federal system, is definitely to color the future policies of state governments. Second, with the defeat in Michigan of an amendment to abolish all property taxes, in Minnesota of one to eliminate all state property taxes, and in Colorado, Georgia, and Oregon of movements toward general tax limitation, it seems evident that the great depression tax limitation drive is losing popular appeal. Only Nevada reversed this general trend.

A lesson for amendment drafters is inherent in the failure of two measures which were in a general way conscientiously aimed toward public improvement. California's omnibus civil service proposal and Michigan's county reorganization scheme went down to defeat largely because the original proponents neglected to "clear" with all the interested groups.

*Banks.* Opinion remains divided as to the extent of responsibility attendant upon the holding of bank stock. Whereas Maryland, Ohio, and South Dakota removed the existing double liability (in Ohio, by a vote of 1,078,160 to 24,968),[3] Nebraska and Utah refused to do so.

*Census.* Iowa has finally decided that, without being a rabid centralist, one can efficiently and economically utilize many federal services. Hence,

[1] The writer wishes to express his appreciation to Mr. Stewart Wilson, of the staff of the Council of State Governments, for the use of a bulletin prepared by him and for other materials. The Council bulletin includes all amendments and direct legislation, while this article is limited to the more important amendments.

[2] No former issue of this REVIEW has noted so impressive a list. It is possible that 1936 was actually an unusually fruitful twelvemonth, but it may also be that, because of incomplete responses to questionnaires in the years prior to 1935, some states voting on amendments were omitted from previous lists.

[3] In all cases, the affirmative vote is given first.



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she repealed her constitutional provision for a decennial state census (364,536 to 266,713).

*Civil Service.* California's rejected civil service measure, referred to above, was opposed by civic groups and public personnel executives on the grounds that it was badly drafted, inflexible in form, and designed to cover in, without qualifying examinations, all present incumbents. Not unnaturally, the proposal was supported by employee associations.

*Constitutional Conventions.* Rhode Island voters surprised everyone in March by rejecting (88,407 to 100,488) a proposal for the much-needed constitutional convention which had been forced through the legislature in the preceding year. New Yorkers voted (1,413,604 to 1,190,275) to hold a constitutional convention in 1938.

*Counties—Consolidation:* Alabamans frowned on the consolidation of county government in Jefferson county (Birmingham) (69,055 to 99,080), and California, also averse to change, refused to extend to all counties the privilege—now enjoyed by counties of more than 200,000—of merging city and county government (793,050 to 887,235). Montana in effect almost prohibited the abolition or consolidation of counties, for she attached to her consent the proviso that a majority vote of electors in the county affected should be necessary before the step be taken (78,893 to 59,337). Such a majority is rarely obtained. Florida sanctioned the union of Key West and Monroe county. *Home Rule:* Michigan's vaguely worded county home rule measure evoked popular disapprobation. *Salaries:* A wholesome attempt to substitute salaries for fees in Limestone county, Alabama, was unsuccessful (65,329 to 80,467).

*Courts—Supreme Courts:* In Idaho, the supreme court was given original and appellate jurisdiction on points of law over orders of the Industrial Accident Board. In North Carolina, the number of justices has been raised from five to seven and permission was granted for the court to sit in sections in all cases not involving constitutional questions (257,980 to 168,496). *Local:* Detailed new provisions for districting and for election of district judges were approved in Louisiana. *Criminal Appeals:* Californians want no special court of criminal appeals, it is evident: they defeated the proposal by a five-to-one vote (278,498 to 1,378,765).

*Crime Control—Probation and Parole:* A modernized mechanism for probation and parole direction was established in Texas, i.e., a board of three members, one appointed by the governor, one by the supreme court justices, one by the court of criminal appeals. At the same time, a self-executing constitutional amendment which sanctioned probation in cases involving a sentence of less than five years was rejected by Alabamans (68,711 to 93,009). Similarly in Nevada, judicial power to suspend sentences in certain cases was denied. *Prisons:* California has authorized maintenance of separate institutions for female felons (879,010 to

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871,557). *Criminal procedure:* Prosecution on information filed by the prosecuting attorney as well as on grand jury indictment is now possible in Arkansas. The same state has ratified the simplification of circuit court procedure. In Michigan, the accomplished criminal shot-putter is no longer safe, for it is now legal to use as evidence fire-arms and other weapons seized outside dwellings and on closely adjacent land.

*Education.—Retirement:* Missouri and Texas have authorized teachers' retirement systems. However, the amendment in the former state is not self-executing. *Freer education:* Free textbooks and school supplies in Louisiana will henceforth make the acquisition of learning even less expensive than formerly (258,051 to 36,360). *No appeal:* Even school teachers did not escape the attacks of California's dissenting majority. Voters in that state registered a determined disapproval of the proposed elected state tenure board which was to have heard appeals by discharged teachers from the decisions of local school boards (438,490 to 1,259,603).

*Elections.* Satisfied with their present plan, Californians declined to change the permanent registration system now in effect (471,478 to 1,193,690). Louisiana approved the registration of electors (231,990 to 49,294) and removed the restriction against absentee voting by mail (231,868 to 50,150).

*Juries.* Chivalry persists in the Centennial State. Coloradans rejected an amendment which would have subjected their women to the inconvenience—so strenuously avoided by most men—of jury service. Nevada refused to change her existing rules concerning number of jurors, but voted to permit waiver of jury trial in criminal cases.

*Labor.* In Montana, all workers except those engaged in farming and stock-raising will henceforth be protected by an eight-hour-day law (105,407 to 101,438); while in Texas state employees will be covered by a workmen's compensation insurance plan.

*Legislatures.* Arkansas created a legislative reapportionment board consisting of governor, secretary of state, and attorney-general to reapportion the state legislature after each federal census. South Dakotans followed much the same technique, approving (122,381 to 89,949) a measure to limit the size of the legislature (house, 50 to 75; senate, 25 to 35) and to provide reapportionment by the governor, superintendent of public instruction, presiding judge of the supreme court, attorney-general, and secretary of state, if the legislature shall fail to reapportion. Texans adopted a measure limiting the representation of certain large counties.

Salaries of legislators were under question in several states—in most of which attempts at increases were defeated. Delaware is still awaiting action on her legislative salary increase; Missouri rejected a proposal to substitute for per diem payments a monthly salary of $125; Oregon voters apparently still think $120 a session sufficient legislative pay, for they did

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not favor the proposal to re-define by law the salaries of their senators and representatives; Utah voters disallowed an increase from four to eight dollars per day; and Washington refused to permit five dollars per diem expenses for legislators. New Jersey is considering an amendment for biennial sessions.

*Liquor Control.* Contrasting strongly with the preceding year of hectic action on this problem was the 1936 liquor record. Oklahomans voted to remain dry; California refused to permit local option (719,185 to 1,474,571); and Texans put a negative cross opposite the proposal for a state liquor monopoly with local option.

*Municipalities.* The languishing home rule movement revived locally in West Virginia: cities in that state are now empowered to draft their own charters.

Recent thoughtful amendments have improved the California home rule provisions. It will now be possible on the same ballot to vote on the question of electing a board of freeholders and to signify one's preferences for members of that board. Moreover, the legislative body of a city or of a city-county unit has also been authorized to frame a charter for submission to the electorate.

*Power.* When Washington rejected a proposal authorizing state ownership of power plants and wholesale distribution by the states, she left disinterested political scientists in some doubt as to whether she was condemning public ownership or expressing satisfaction with her many municipally owned plants.

Oregon defeated (100,356 to 208,741) an amendment providing for temporary administration of the state power act by the board of control and, at the same time, an initiated statute for a state-operated power system (131,489 to 208,179).

*Public Property.* Governmental bodies in California have been refused permission to acquire art galleries or to enter into contracts or leases with non-profit corporations in the state.

North Carolinians voted (255,416 to 149,086) to restrict increases of local and state indebtedness for any biennium to two-thirds or less of the amount which the debt has been reduced in the preceding biennium. South Dakotans voted (106,610 to 91,282) to permit the government to engage in public works for the economic development of the state, but indebtedness for this purpose was limited to one-half of one per cent of the assessed valuation.

*State Lands.* A successful Idaho amendment permits exchange of state lands for other lands under agreement with the United States. Minnesota rejected (448,917 to 397,106, number of votes necessary, 582,135) a similar measure, as did Wyoming.

*State Militia.* Indiana adopted (426,031 to 398,201) a joint resolution permitting Negroes to enter the state militia.

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*State Officers.* Apparently, "public service" connotes more than railroad regulation to Californians, for they defeated (306,831 to 1,331,767) an amendment to name the railroad commission the "public service commission." They also went on record against limiting the present fixed term of six years for commissioners, and refused (748,486, to 1,432,559) to create an alcoholic beverage commission which would have assumed—and extended—the licensing and regulatory powers of the state board of equalization.

Georgia voters indicated that they do not want a lieutenant-governor nor a state superintendent of schools. Nor do they favor lengthening the term of the governor and other officers from two to four years (76,164 to 117,434). Election of the president of the senate was also disapproved.

Louisiana created a department of revenue; repealed the disqualification of legislators for offices created during their term in the legislature (224,937 to 57,888); and made the state treasurer eligible to succeed himself.

Maryland approved a measure which allows the governor to fill vacancies in the legislature; Nebraska abolished the office of commissioner of public lands and buildings; South Dakota approved the non-partisan election of the state superintendent of public instruction and of county superintendents. Salary raises were in order in Texas, where the governor will henceforth receive $12,000; the attorney-general, $10,000; the comptroller, treasurer, land office commissioner, and secretary of state, $6,000 each. Utah rejected appointment of the superintendent of public instruction.

Missouri voters approved the creation of a four-member state conservation commission. In fact, the newly revived conservation pressure group, with a program probably patterned on the Michigan organization, is active in a number of mid-western states. While the efforts to free conservation from "politics" is commendable in intention, it should be noted that creation of these independent commissions is likely to hamper state planning, of which conservation is, of course, an extremely important part.

*Social Security.* Oklahoma voted (346,950 to 210,888) to create a social security board of its own; while South Carolina empowered the general assembly to enact social security legislation. Colorado handsomely leads all states with her minimum pension of $45 a month for all indigent folk over sixty. Florida and Kansas voted to devote state funds to a program of old age assistance (490,176 to 172,473). The Sunflower State also authorized unemployment compensation and contributory old age pensions (532,042 to 179,582). A number of other states passed initiated and referred social security statutes.

*Taxation.* The classified property tax had a tie score, with North Caro-

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lina approving it (242,897 to 152,516) and Georgia rejecting it (65,093 to 149,898). Californians refused (829,440 to 1,061,114) to forbid diversion of motor vehicle fuel and license taxes. Colorado voted a specific graduated ownership tax on motor vehicles. *Income taxes:* Californians disapproved (737,629 to 1,193,225) a measure repealing personal income tax laws and providing for a popular vote on any income tax, and North Carolina voted (242,492 to 178,373) to raise the limit on taxation of net incomes from six to ten per cent. North Dakota and Washington rejected net income tax amendments, but Coloradans authorized a graduated and/or proportional tax. *Tax limitation:* As we noted above, attempts at tax limitation lost out at the polls in five out of six states. Rejected: in Colorado, an over-all limitation of 20 mills in incorporated cities and towns and 15 mills elsewhere; in Georgia (65,093 to 149,898), a measure for limitations on taxes on several classes of property; in Michigan, the abolition of all property taxes; in Minnesota (355,588 to 543,847), the elimination of state property taxes except for indebtedness; in Oregon (79,604 to 241,042), an over-all limitation of six mills in 1937, to be reduced four per cent annually to four and eight-tenths mills in 1942. Only in Nevada (where an over-all limitation of five cents on the dollar was approved) was the movement successful. Apparently the real estate boards must revise their tactics—or subscribe to the broader outlook.

Ohio passed (1,585,327 to 719,966) and Michigan defeated measures exempting food from the sales tax. Mississippi refused to authorize a gross income or sales tax.

Other exemptions were considered more leniently. Colorado belatedly permitted exemption of property used solely for religious worship, for schools, for cemeteries, and for strictly charitable purposes. Also, Arkansas adopted a homestead exemption proposal; North Carolina approved (312,976 to 166,752) an exemption to $1,000; and Utah authorized the legislature to raise the existing exemption to $2,000. A number of minor exemptions were passed in Louisiana.

As indicated above, so heterogeneous are the subjects submitted to popular vote, and so various are the returns on the subjects submitted, that definitive conclusions are impossible. Only in the two fields of tax limitation and social security legislation is there evidence of a general trend. Impetuous generalizers may chafe at the slow accumulation of significant data, but more patient and cautious students of the subject can at least console themselves with the hope that, over a long period, the results of this direct legislative process will afford a trustworthy check on the genuinely representative quality of our state legislatures.

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**Extraterritorial Powers of Cities as Factors in California Metropolitan Government.** Some students of metropolitan problems have suggested that the granting of extraterritorial powers to municipalities by state legislatures may provide a temporary integration of governmental agencies within a metropolitan region. Inevitably, however, the development of such powers in any extensive fashion must lead to additional confusion in the already tangled web of jurisdictions. The problems of relationship of governmental units are simply multiplied. This is illustrated by the experience of cities in California. A wide range of power has been given by the state constitution and general laws whereby the cities may undertake public utility projects within and without their municipal boundaries as deemed necessary. The courts, for the most part, have been liberal in interpreting extramural powers of cities undertaken both (a) as municipal corporations providing service, and (b) as governing units exercising the police powers. A significant addition to municipal powers has been made by interpretation of the constitutional provision that cities shall have exclusive jurisdiction in "municipal affairs." In an early case that established a controlling doctrine, the court said: "The supplying of water to outside territory, being necessarily a matter incidental to the main purpose of supplying water to its own inhabitants, is as much a municipal affair . . . as is the main purpose, which is conceded to be such, and therefore charter provisions relating thereto prevail over general laws, if inconsistent therewith."[1] In similar matters, the cities become free agents under freeholder charters except as they encounter the jurisdiction or interest of other cities.

The California courts were first called upon to determine the power of cities to build sewers beyond their boundaries when legislation did not expressly permit construction of an outfall. McBean v. City of Fresno (112 Cal. 159) became a leading case on extraterritorial powers wherein the rule was stated that if the exercise of powers extraterritorially was necessary and proper to the performance of expressly granted powers, such exercise was valid. An earlier case, City of Pasadena v. Stimson, had upheld the power of a city to build its sewer lines along and through the streets of an adjoining city so as to connect with the municipal sewage farm several miles outside the city limits.[2] So long as the city conformed to requirements of state law, the court refused to regard an underground sewer as a menace to the inhabitants of the city through which the line ran. However, this power of a city to go beyond its area in disposing of its sewage has figured in metropolitan politics in the Los Angeles area on several occasions. Two communities, one suburban and one distinctly

[1] City of South Pasadena v. Pasadena Land and Water Co., 152 Cal. 582. See also Fellows v. City of Los Angeles, 151 Cal. 52.

[2] 91 Cal. 239.

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rural, have felt it necessary to incorporate as municipalities in order to prevent neighboring cities from locating sewage farms in their areas.

Water has been the determining element that controls the development of cities as well as of agricultural areas in the Western states. At a comparatively early period, cities found it desirable to purchase the many small water companies that served within the urban territory and to undertake a unified municipal service. It has been settled beyond doubt that cities may go far afield in search of a water supply, may purchase land and water rights of existing holders, may file on water rights in the public domain, and build the necessary dams, reservoirs, and aqueducts to store and distribute the water. Los Angeles has gone into the Owens River valley, San Francisco to the Hetch Hetchy, and other cities lesser distances to the mountains, for water. Several interesting problems arise as an increasing number of cities compete for the available water rights. What principles shall govern this contest? In the case of East Bay Municipal Utility District v. City of Lodi (120 Cal. App. 741), the courts held that inasmuch as the defendant city had made no attempt to put the water claimed by it to any public use, it could not prevent the district from condemning its riparian rights for use. The question that next arises is, how much land may a city acquire beyond its borders for development of a water supply system? San Francisco owns large holdings in two other counties and leases part of the land for agricultural and country club purposes. Los Angeles is reported to own seventy-five per cent of the taxable land in Inyo county and owns substantially all the property in the towns of Lone Pine, Independence, and Big Pine. These cities have become large taxpayers in other counties and cities under a provision of the state constitution that makes property owned by a city outside its limits subject to taxation the same as other property.[3] The courts have never been called upon to determine limits to such municipal ownership. In fact, they have taken judicial notice that increased population demands an increased water supply and have upheld purchases of land extraterritorially so long as there is no question of fraud.[4]

In every metropolitan community, there is a cluster of cities surrounding the central city. As a city seeks to convey its water supply obtained outside its limits to its inhabitants, it must cross other municipal boundaries. In doing so, what regulations must it observe? One state law grants a general franchise privilege to cities to lay utility lines through the streets of other cities, but requires approval of the council in the municipality in which the work is done.[5] The courts have ruled that the city

[3] Cal. Constitution, Art XIII, sub. 1; San Francisco v. County of Alameda, 91 Cal. Dec. 202.

[4] Wehrle v. Board of Water and Power Commissioners of L.A., 211 Cal. 70.

[5] Cal. Stats. (1911), p. 852.

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of Beverly Hills could not refuse permission for construction of water mains through its territory by Los Angeles, because the latter had plans for the construction under way before the former was incorporated.[6] A later act removes the necessity for approval by the city through whose territory the utility line will run. However, the use of this general franchise is subject to the "reasonable" regulation by the city council as to routing of the line and other regulations not in conflict with state law.[7] If the two cities disagree as to terms and route, their only recourse is to the superior court of the county. This franchise grant has been upheld by the courts as not being special legislation. The state has plenary power over the streets and highways and might grant such use thereof as appeared best. It is immaterial whether notice of desire to use the streets constitutes acceptance of the franchise by the city that desires to avail itself of the privilege or whether acceptance is incomplete until terms are settled by a court.[8] A recent controversy on this point involved the building of a power line by the city of Los Angeles from the Colorado River over a route that ultimately came through the streets of Southgate. The state supreme court refused to entertain the suit by the complaining city or to take the matter from the district court of appeals.[9] Los Angeles has since completed the line as planned.

A significant distinction exists, however, between the power of a city to interfere with the franchise granted another by the state and the power of a city to issue permits for construction of works within its limits. In the case of City of South Pasadena v. City of San Gabriel, the court upheld the delegation of power by the latter city to a municipal officer to issue or refuse a permit for drilling for water within the city limits.[10] The officer had refused South Pasadena a permit to drill or to build a pump station and storage tank upon lands owned by it within the limits of San Gabriel. The court went to a doubtful extreme when it applied a test devised by it to determine if the section in which the drilling was to be done was sufficiently residential to warrant use of the police power to prevent a use that might be detrimental to residence property. The majority of the court determined that, although the section was given over to small farming on lots larger than the usual city lot, the tendency was towards making it a residential community. Hence well-drilling might be prohibited as a potential nuisance. Inasmuch as such cities as South Pasadena are completely surrounded by incorporated territory, this

[6] City of Beverly Hills v. City of Los Angeles, 175 Cal. 311.

[7] Cal. Stats. (1923), p. 147.

[8] City of Los Angeles v. City of Southgate, 108 Cal. App. 398.

[9] City of Southgate and City of Huntington Park v. City of Los Angeles, 92 Cal. Dec. 301.

[10] 134 Cal. App. 403.

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decision indicates that the city will be forced to decide among three options: (1) exploitation of that part of the water table that lies within its own limits, (2) search for water rights in the mountains, (3) membership in some union of cities such as the Metropolitan Water District.

The groups that have been interested in the development of municipal water and power systems probably never contemplated that a city would go into the business of utility service in territory other than its own. However, in a metropolitan area there arise instances in which it may be desirable or necessary for a municipal utility to supply extra-municipal territory. In the leading California case on this matter, the court held not only that a city might sell its surplus water to inhabitants of adjoining cities and unincorporated territory, but that under certain conditions it incurred a legal obligation to do so.[11] When the city of Pasadena purchased the rights and property of the private company supplying parts of two cities, it was obligated to continue supplying the inhabitants of South Pasadena. However, the obligation did not extend to maintaining a distributing system in the latter city. A constitutional amendment and enabling legislation passed soon after this case was decided clearly enabled municipal corporations to furnish public utility services to inhabitants of other municipalities. The sole qualification attached was that a city might not enter into competition with another city operating its own utilities unless given permission by the latter.[12] Several cities in the metropolitan area of Los Angeles sell water to inhabitants of other cities or directly to the cities. By contractual arrangement, the city of Los Angeles is disposing of surplus power from the new Colorado River source to Glendale and Pasadena. The term "surplus" has had a varying meaning, but the courts have adopted a tolerant attitude, as expressed in Clark v. City of Los Angeles.[13] The justice who delivered the opinion wrote that the ordinance starting proceedings did not indicate any intention to engage in unlimited business. Should the city attempt to engage in business solely for profit, its power to do so might then be tested.

The problem of regulating rates and services of municipally operated utilities has been left a local affair. The courts have insisted that a municipal corporation gives up none of its governmental characteristics when it undertakes public utility business functions. They interpret the regulatory power of the state railroad commission to extend only to privately owned utility concerns.[14] They have confessed that there may

[11] See the South Pasadena v. Pasadena Land, etc. Co. and Fellows cases cited previously.

[12] Cal. Constitution, Art. XI, sect. 19 as amended in 1911; Cal. Stats. (1911), p. 1394.

[13] 160 Cal. 30. See also Miller v. City of Los Angeles, 185 Cal. 440.

[14] City of Pasadena v. Railroad Commission, 183 Cal. 527. See also Los Angeles v. Southgate, above.

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be confusion as to jurisdiction in controlling the sale of water or electricity by one city to another under conditions laid down in South Pasadena v. Pasadena Land, etc. Co., but they have not been called upon to determine the issue. Presumably, conditions must be regulated by inter-city negotiation. South Pasadena finally established its own water system after having purchased from Pasadena for twenty-five years.

Another problem of metropolitan interest has been presented as Santa Monica and Culver City have developed municipal bus services to provide transportation from those suburban communities into Los Angeles. Thus far, the council of the latter municipality has permitted them only to connect with street car lines in the outer sections and has refused permission to operate directly into the central section of the city. Other cities are reported to be awaiting successful negotiations for a downtown terminus before proceeding with plans for municipal bus lines to take care of their interest in the metropolitan transportation problem.

Thus far, efforts of municipalities to enforce ordinances upon populations beyond their borders have been relatively restricted. The power of the cities to make rules and regulations governing conduct on certain types of property owned outside their limits has been clearly established. A city ordinance governing conduct on a municipal airport outside the city has been sustained.[15] Conduct and control of a mountain playground by a city is not unlike its control of a city park.[16] The leading case on extraterritorial regulation of health affairs has been *In re* Blois. In this case, the power of a municipality to enforce its ordinances upon persons having their business establishment in another city, but doing business also within the enforcing city, was approved.[17] General legislation permits counties and cities to maintain milk inspection service and to make contracts with other counties or cities to perform such work in coöperation.[18] However, the cities of Los Angeles and Pasadena insist upon a somewhat higher standard of inspection and maintain their own inspection services far beyond their municipal borders to inspect milk at its sources. With the development of far-flung water systems, it might be expected that cities would request power to enforce sanitary ordinances on municipally-owned watersheds. However, the fact that such supplies are being drawn chiefly from areas far beyond the metropolitan areas lessens that problem at present.

An ordinance of the city of Oakland provided for inspection of meat that was to be used for food within the city, the inspection to take place at the slaughterhouse whether within or without the city. A large portion of the city's meat supply is slaughtered in neighboring cities. In 1931,

[15] Ebrite v. Crawford, 215 Cal. 724.
[16] Kellar v. City of Los Angeles, 179 Cal. 605.
[17] 179 Cal. 291.
[18] Cal. Stats. (1923), p. 839; amended (1927), p. 1944.

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a state meat inspection law provided for state slaughterhouse inspection and authorized municipal inspection under certain conditions. In 1934, the state director of agriculture refused to grant a permit to Oakland under the 1931 act on the ground that he had no power to permit municipal inspection outside city limits. The court applied the rule that a city may exercise powers necessary to and fairly implied from the specific power granted by general law or charter, and thereupon sustained the city.[19] In viewing this use of the inspectional power as essential to the declared purpose of the meat inspection ordinance, the courts may have set a precedent that will allow cities to extend their interest into the surrounding metropolitan area.

A development that shows a better solution of problems of metropolitan government is illustrated by city planning. A 1927 planning act gave cities power to control subdividing and platting of land lying within three miles of the corporate limits and not located in any other municipality.[20] A 1929 act modified this power over extraterritorial areas so as to permit a city planning commission to include land outside the city's boundaries in its master plan, but gave no power of control.[21] The development of county planning commissions authorized to plan the development of unincorporated territories eliminates the necessity for a city using extraterritorial power in that respect. Perhaps the best integration of governmental functions in a metropolitan area that coincides with the county area would be accomplished by transferring such municipal affairs to the larger unit. Likewise, utility services might be transferred to a metropolitan utility district. At present, the development of extraterritorial power in the metropolitan areas of California gives the cities the character of local interest centers competing among themselves for spheres of influence in a complicated jurisdictional scene.

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[19] City of Oakland v. A. A. Brock, 86 Cal. App. Dec. 715.
[20] Cal. Stats. (1927), p. 1899. [21] Cal. Stats. (1929), p. 1805.

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## PUBLIC ADMINISTRATION

**The Recent Movement for Better Government Personnel.**[1] Calling for the final abolition of the spoils system through the substitution of career service, Franklin D. Roosevelt has come forward with the boldest, the most courageous, and the most constructive step in his career. This program is part of his plan for the reorganization of the administrative structure and the fiscal controls of the government. There may be minor debatable issues. However, the comprehensive program is a weaving together of the best constructive thought of the past generation with regard to American government.

Two years ago, such a proposal would have been chimerical. A favorable reception would have been no less than a miracle. Yet today we find that a consensus of press opinion supports the President's merit system proposal, even where it is critical of the rest of the plans for administrative reorganization. Two years ago, only a small handful of outstanding individuals would have realized the significance of this step. Today, according to polls conducted by the Institute of Public Opinion, approximately 88 per cent of the people are in favor of the merit system. There are large numbers throughout the country who know what better government personnel means, so that it is going to be extremely difficult for any spoilsman to oppose legislation for the full establishment of the merit system. Two years ago, experts in public administration would not have been in a position to advise the President to recommend such sweeping reforms. Today we have an easily accessible body of factual knowledge into which has gone thorough research and years of thought.

The drive for an improvement in government personnel during the last few years is a movement whose spontaneity and vigor have united to make it a truly dynamic force in our national life. A brief review of recent activities of various groups and agencies behind this new personnel movement will throw further light on its inherent strength and what the future can expect from it.

*Civic Groups.* In the first place, there is the work of the civic groups. Probably the organization that has led the way and accomplished more than any other single group recently is the National League of Women Voters and its state and local chapters. In 1934, the League determined on a two-year campaign for an improved personnel in government. Adopting the slogan "Find the man for the job, not the job for the man," the League has been most successful in making lay citizens merit-system-

[1] This article is based on a report originally presented to the round table on career service at the Atlanta meeting of the American Political Science Association, December 27, 1935. I wish to acknowledge the assistance of Frances Cole in collecting material to bring the report up to date.



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conscious. Through its efforts, over 2,000 copies of the report of the Commission of Inquiry on Public Service Personnel have been distributed.

The National Civil Service Reform League, progenitor of the civil service movement and its custodian for fifty years, has practically become a new organization through increased vigor and activity. During 1935 alone, it distributed over 15,000 documents in response to individual requests. Within recent weeks, its new president, Robert L. Johnson, has begun to rally the support of civic groups and business leaders for the President's merit system proposals.

One hundred and eight separate civic organizations joined together, early in 1935, in the United Front for Better Government Personnel to educate their members and the public on the need for improving the public service. Each of these associations has set up a committee on government personnel and has used as a study guide the report of the Commission of Inquiry on Public Service Personnel, *Better Government Personnel.*

November of 1936 saw the establishment of the Pennsylvania Federation for the Merit System for the purpose of waging an aggressive campaign to bring about merit system legislation in the 1937 session. The Federation is composed of 17 state-wide civic and professional organizations.

Only last June, the Connecticut Civic Association was converted into the Connecticut Merit System Association, which is affiliated with the National Civil Service Reform League. Horace D. Taft is its president. In a recent circular letter, the executive secretary, Laurence C. Smith, stated that local units already have been or are being formed in approximately half of the towns and cities in Connecticut, and that over 4,000 pamphlets have been distributed.

*Organized Officials.* Turning from the civic groups to the organizations of officials, the International City Managers' Association, the Civil Service Assembly of the United States and Canada, and the National Federation of Federal Employees are found in the vanguard. The first organization devoted one of its sessions in 1935 to trained government personnel, with the result that a Career Service Committee was appointed. At the 1936 annual convention, this committee made an excellent report. The Association insists that the managers themselves recognize their responsibilities for their part in the training of young men who are going into the public service by taking them into their administrative service as apprentices or internes in the process of training. The Civil Service Assembly has placed its activities on a permanent basis through the establishment of a headquarters office under the management of a full-time director, the office serving as a clearing house of information on public personnel administration. A monthly *News Letter* was first issued

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in June, 1935, presenting the outstanding developments in the field. This bulletin has continued to be probably the best concise statement of current happenings. The National Federation of Federal Employees is one of the older organizations of its kind and continues to rank as the leader among government employee organizations. Throughout its existence it has taken a constructive stand on public personnel policies, which are discussed thoroughly in its monthly magazine, *The Federal Employee.*

Other groups of officials which have been active are the leagues of municipalities, a half-dozen of which have done special, intensive work in public education and in education within their own ranks as to the meaning of a career service in government. The American Association of Social Workers has taken a special interest in the merit system. Practically every month, a discussion of some phase of public personnel problems has appeared in the official publication of the Association, *The Compass.*

*Convention Programs.* Another index of the change of public opinion is found in the conventions of civic and professional organizations. The International City Managers' Association, the Civil Service Assembly of the United States and Canada, the National Federation of Federal Employees, and the American Association of Social Workers have been mentioned. In 1935, a session of the annual convention of the American Water Works Association was placed in charge of a special committee on government personnel—the first time in the history of this organization that it had shown such pronounced interest in the problem. In 1935, the National Municipal League devoted one session, and in 1936 three sessions, to the subject of better government personnel. At the first convention, a committee was appointed to draft a model state civil service bill. When finished, the bill will be published as one of the League's pamphlet series of model laws. The American Prison Association adopted a strong resolution supporting the merit system and training programs for all prison employees at its annual congress in September, 1936. A resolution empowering the officers of the United States Conference of Mayors to prepare a plan for "assembling data on the training and qualifications necessary for technical and specialized officials of city government and provide ways and means for qualifying applicants and compiling a list of available qualified persons from which municipalities might select suitable persons when desired," was unanimously adopted at the annual fall conference in 1936. The entire program of the conference of the American Academy of Political and Social Science on November 16, 1936, was devoted to a discussion of improved personnel in government service. This meeting was followed by an issue of the *Annals*, January, 1937, in which papers by many of the outstanding authorities on the subject were brought together. During National Civil Service Reform Week of

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January, 1937, conventions were held over the air. There were three nation-wide hook-ups and innumerable local broadcasts, in addition to "listening-in parties" and mass-meetings arranged by civic groups and officials' organizations in many places. The high point in broadcasts was America's Town Meeting of the Air, Thursday evening, January 14, which was devoted to a discussion of the question, "Shall all federal employees be under the civil service?"

In addition, the National Conference of Social Workers, the American Public Welfare Association, the American Library Association, the Consumers' League, the American Association for Labor Legislation, the American Economic Association, the American Statistical Association, the Government Research Association, the American Political Science Association, the Southern Economic Association, the General Federation of Women's Clubs—to name only a few of the interested organizations—have taken up government personnel in special sessions of their conferences. Mention must be made also of the many meetings that the National League of Women Voters has held in its citizenship schools and in its regional conferences, and the nation-wide series of conferences held by the National Federation of Business and Professional Women's Clubs.

*Educational Institutions.* An outstanding event in formal education is the tangible growth of attention given to public administration in the last two years. In 1935, there were some 35 colleges and universities which offered definite courses in public administration designed to prepare their students to perform more satisfactorily tasks in the public service. Today, over 100 educational institutions offer comprehensive treatment of the subject.

During the last few years, the most conspicuous event was the grant to Harvard University by an American industrialist and former member of Congress, Hon. Lucius N. Littauer, of $2,000,000 to establish a school of public administration. It is interesting to note that this endowment in 1935 came just 25 years after the establishment by the old New York Bureau of Municipal Research of its Training School for Public Service, an organization which was laughed out of academic circles as unworthy of recognition. Men who took work in the old Training School did not get credit; they had to bootleg their training in administration. A generation has seen the complete transformation of this attitude.

The well known Princeton Conference on Training in Public Service, in 1935, served to crystallize thought on training up to that time and to give greater momentum to the already fast rolling ball. This conference, organized by the Public Administration Clearing House of Chicago, was attended by 28 representatives from public agencies and educational institutions. This highly significant gathering carried forward the discussion initiated by the first conference on training for the public service held in

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1915 in New York and continued by the Minnesota conference of 1931 and the Chicago conference of 1934.

The year 1935 marked the extension of the Syracuse School of Citizenship and Public Affairs to a two-year basis. It witnessed the establishment of the National Institute of Public Affairs on a definite graduate level, based upon a first year of experimentation. The School of Public Affairs of Washington University has now established and expanded its in-service training program. At the Harvard School of Business Administration, a study program in public administration was inaugurated "to give the business man a better understanding of the government with whose forces he comes in constant contact, and . . . to aid the community by providing a trained personnel for public business."

The last year has seen the expansion of each of these schools, as well as the addition of new ones. The University of Wisconsin held, in cooperation with the state board of health, a training course for sewage plant operators. Among other universities coöperating in giving post-entry training courses are Ohio State University, the University of Southern California, and the University of Kentucky.

The schools organized by the state leagues of municipalities have gone forward to a finer recognition of their tasks, with larger attendance than ever in their history. In 1935, the New York Conference of Mayors and Other Municipal Officials alone had an attendance of 7,500 public officials in its regular credit courses, and its training school was incorporated as an educational institution by the New York State Board of Regents, recognizing that it had a definite place in the educational system of the state of New York. Within the same year, more than 30,000 firemen attended the state and regional schools which were conducted in 42 states. During one or more of the past five years, training schools of the leagues of municipalities have been held in 20 states. In 1931, approximately 7,000 municipal employees were reached by these schools. By 1936, the total annual attendance had grown to nearly 14,000.[2]

An interesting development is the establishment of apprenticeship positions offered by nearly all of the 17 public administration associations affiliated with the Public Administration Clearing House in Chicago. Since only one apprentice is taken on at a time by a single organization, there is keen competition, with the result that outstanding college graduates are being inducted into the field. The period of training is nine months, during which a minimum salary is paid. So far, individuals going through this training have immediately received positions in public administration. This system furnishes not only an excellent opportunity for brilliant young men and women to enter the field, but also an excellent

[2] Arnold Miles, "In-Service Training by State Leagues of Municipalities," *Annals of the American Academy of Political and Social Science*, January, 1937.

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means of attracting the best brains and the finest character to the government service.

In Washington, the United States Department of Justice, through the Federal Bureau of Investigation under the direction of J. Edgar Hoover, conducts three types of training schools. The first and oldest is the training period through which recruits of the bureau itself must go before they can become special agents. Second, a three-months' training course for municipal, county, and state police officials was conducted as an experiment in the summer of 1935. This was so successful that it reopened in July, 1936, as the National Police Academy of the Federal Bureau of Investigation. Representatives of 34 police agencies attended this course in scientific crime detection. The purpose of this school is primarily to train teachers who will open similar training schools throughout the United States. Following the National Police Academy come the fingerprint identification schools which are to be conducted for periods varying from half a day to one week in each of the 37 field offices of the bureau. Many of these have, indeed, already been held.

The Graduate School of the Department of Agriculture gave a special ten-weeks' course on elements of personnel administration, which was open to all government employees in Washington, especially those holding supervisory positions or interested in preparing themselves for such positions. Similar work is being carried on by the Soil Conservation Service, which began in the fall of 1936 to select students who have qualified through civil service examinations to take a training course that will be combined with practical work in the field activities of the service. Upon completion of the course, successful candidates will be eligible for promotion into the regular service.

Space does not permit consideration of the varied training given in other branches of the federal service,[3] but mention should be made of the training program of the TVA. Under the leadership of Dr. Floyd W. Reeves, personnel director, the TVA undertook the most ambitious employee education-training program every launched in this country or probably in any other. Coupled with in-service training is a broad schedule of occupational and cultural education intended to develop the inherent skills and capacities of TVA employees to the point where they will be contributing to the project the maximum of their ability.[4]

*New Books and Magazines.* A flood of publication on government personnel began in January, 1935, with *Better Government Personnel*, the re-

[3] For a full statement of this training, see John E. Devine's *Post-Entry Training in the Federal Service.* (Public Administration Fund, August, 1935, 75 pp., mimeographed.)

[4] Dr. Reeves has described this program in "TVA Training," *Journal of Adult Education*, Vol. 7, No. 1, pp. 48–53.

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port of the Commission of Inquiry on Public Service Personnel. The list is impressive.[5] There has been a stream of articles in magazines varying

[5] In addition to the publications of the Commission of Inquiry on Public Service Personnel, I would list as the most important:

American Academy of Political and Social Science, *Improved Personnel in Government Service.* (*Annals*, Philadelphia, January, 1937, pp. 268.)

Ayres Brinser, *Our Government—For Spoils or Service?* (Washington, Public Affairs Committee, 1936, pp. 31. Public Affairs Pamphlets, No. 3.)

Cincinnati Bureau of Governmental Research, *Public Personnel Administration in the City of Cincinnati.* (Cincinnati, 1936, pp. 223.)

John Edward Devine, *Post-Entry Training in the Federal Service.* (Chicago, University of Chicago, Public Administration Fund, 1935, pp. 73.)

René Didisheim, *La Formation des Agents de l'Administration.* Synthèse des Délibérations et Conclusions des Conférences de Zurich, Berlin, et Varsovie. (Bruxelles, Institut International des Sciences Administratives, 1937, pp. 51.)

Katherine A. Frederic, *Trained Personnel for Public Service.* (Washington, National League of Women Voters, 1935, pp. 51.)

International City Managers' Association, *Training for Municipal Administration.* (Chicago, 1936, pp. 20.)

International City Managers' Association (Institute for Training in Municipal Administration), *Municipal Personnel Administration.* (Chicago, 1935, pp. 414.)

Joint Committee on the Merit System, *The Merit System in Illinois.* (By Joseph Pois and others, Chicago, 1935, pp. 62.)

Morris B. Lambie, ed., *Training for the Public Service.* (Chicago, Public Administration Service, 1935, pp. 49.)

Lewis Meriam, *Public Service and Special Training.* (Chicago, University of Chicago Press, 1936, pp. 83.)

William E. Mosher and J. Donald Kingsley, *Public Personnel Administration.* (New York, Harper and Brothers, 1936, pp. 588.)

National Civil Service Reform League, *The Civil Service in Modern Government—A Study of the Merit System.* (New York, 1936, pp. 26 and appendix.)

Public Administration Service, *Personnel Administration in the State Government of Michigan; Prepared for the Civil Service Study Commission.* (Chicago, June, 1936, pp. 104, mimeographed.)

*Public Service as a Career.* (Wharton Review of Finance and Commerce, Vol. 9, no. 7, April, 1936.)

William A. Robson, ed., *The British Civil Servant—Studies by Eleven Experts.* (London, Allen and Unwin, 1937, pp. 250.)

O. Glenn Stahl, *Training Career Servants for the City of New York.* (New York, 1936, pp. 262, mimeographed. Ph.D. thesis, N.Y.U.)

Ordway Tead, *The Art of Leadership.* (New York, McGraw-Hill Co., 1935, pp. 299.)

United States Department of Agriculture (Graduate School), *Elements of Personnel Administration.* (Washington, United States Department of Agriculture, Graduate School, 1935, pp. 102.)

——— 74th Congress, 1st Session, House Committee on the Civil Service, *For Improvement of the Government Service;* hearings on H.R. 3980 (Revised). (Washington, Government Printing Office, 1935, pp. 454.)

——— 74th Congress, 1st Session, Senate, Subcommittee on the Civil Service, *Extending the Executive Classified Service;* hearings on V. 564. (Washington, Government Printing Office, 1935, pp. 41.)

Leonard D. White, *Government Career Service.* (Chicago, University of Chicago Press, 1935, pp. 99.)

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from the *Saturday Evening Post* to the *Atlantic Monthly;* from the *New Republic* to the *Rotarian;* from *Collier's* to *Scribner's.* The little sheets of the leagues of municipalities and of voters' organizations have special issues or articles on government personnel. The amount of material that has come out in the ordinary course of magazine literature, in the Sunday supplements, and in the regular news columns of our leading dailies, fills many volumes if translated into terms of the ordinary book. In fact, very little has been written during the past year or so concerning problems of government which has not made some definite reference to personnel.

Reports such as that of the National Resources Board or the Treasury Report on the Tax Systems of Great Britain, volumes dealing with social security and with housing—none of these discussions now emerge and are presented to the public without the authors or the sponsors realizing that they have not performed their task unless they have included some consideration of the problem of personnel involved. Compared with the situation existing a few years ago, this gives an index of what has been happening to our thinking with respect to government personnel. It is interesting to note that the Public Affairs Committee, which has undertaken to make the results of research available to the public in simple form, presented the subject of government personnel in one of its first publications, *Our Government—For Spoils or Merit.*

*Publicists.* The publicists have not only reacted favorably to the new movement but are pushing it along. A small list would include Professor Moley, who wrote several editorials and encouraged the preparation of articles for *Today* on the subject, David Lawrence, Mark Sullivan, Lindsay Rogers, Roger Babson, W. M. Kiplinger, Raymond G. Carroll, Felix Frankfurter, Oliver McKee, Jr., George Creel, Francis Hackett, Dorothy Thompson, Walter Lippmann, Nicholas Murray Butler, James B. Conant, Harold W. Dodds, Glenn Frank, Frank Kent, and others writing specifically on the subject of government personnel in connection with their comments on the national government and its administration.

*Straws in the Wind.* If there were any doubt as to which way the wind is blowing, George Gallup's polls on civil service would be of interest. He conducted two. The result of the first, published March 29, 1936, showed that 88 per cent of the people favored civil service. In a more recent poll, 86 per cent of the people expressed approval on the question, "Should the entire Post Office Department, including the Postmaster-General, be put under civil service?" The significant fact is in the heavy majorities cast for civil service. In no other poll has a majority exceeded 80 per cent.

*Local Government.* Much positive action has taken place in local government in the last few years. Civil service provisions were adopted by such larger cities as Bridgeport, Jacksonville, Birmingham, Memphis, El

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Paso, Flint, Dearborn, and South Gate, California; and by Jefferson county, Alabama; San Diego county, California; Henrico county, Virginia; Camden county, New Jersey; and the Chicago Sanitary District. Among the smaller cities which have adopted merit systems, those voting last November were Ypsilanti, Adrian, and Muskegon, Michigan; Rahway, New Jersey; and Astoria, Oregon. Ten cities acted during 1936 to place firemen under civil service, and three voted to place policemen under the merit system. Ordinances were passed in Trenton, New Jersey, and Toledo, Ohio, improving employment practices for municipal labor. A law was passed in Michigan allowing any city to have civil service for its fire department, and a Florida statute applied civil service to all cities of more than 130,000 inhabitants. Two important California laws authorized small cities to contract with their larger neighbors for personnel service and permitted all cities to adopt by ordinance any type of personnel system desired. In New York City, Mayor LaGuardia has taken a conspicuous and courageous stand throughout his administration in favor of appointment on the basis of fitness and definite recognition of a career philosophy. Even in the courts, he has insisted that men ought not to be appointed municipal court justices without having had experience in judicial and police administration and without possessing a general understanding of the problems of crime and criminology. His leadership has meant a great deal, and he has never failed, whenever he has discussed the subject, to insist that he is working for a career service throughout the New York City administration.

*The States.* Since 1920, it has been correct to say that only 10 states have civil service laws.[6] But on February 3, 1937, Governor Carl E. Bailey signed the Arkansas bill providing for a state civil service system and on February 10 a similar bill became law in Tennessee, making 12 states with merit systems. Which will be next? According to the Civil Service Assembly, the legislatures of Michigan, Tennessee, and Connecticut appear "virtually certain to adopt merit system laws during their present sessions." Merit system legislation of some kind may be expected also in 12 other states this year.[7] The senate of the California legislature has received a completely new civil service act making changes in the operation of the present system to conform with the constitutional amendment passed in 1934. Civic organizations are rallying to support the new bill. Fifteen governors came out in favor of the merit system in their annual addresses and legislative messages this year. The excellent

[6] Massachusetts, New York, New Jersey, Maryland, Ohio, Illinois, Wisconsin, Colorado, and California. Kansas has a law, but it has been inoperative since 1919, three years after its adoption.

[7] Alabama, Arizona, Florida, Georgia, Indiana, Kentucky, Minnesota, Nebraska, North Dakota, Oklahoma, Pennsylvania, and Rhode Island.

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report of the Civil Service Study Commission of Michigan, headed by James K. Pollock, must be mentioned in any review of state activities in the field of government personnel.

*The Federal Government.* As this article goes to press, the federal government stands on the threshold of the most important advance in personnel administration that has been made since the adoption of the Pendleton Act in 1883. On January 12, the President sent his epoch-making message to the Congress, endorsing in its entirety the program of his Committee on Administrative Management, and recommending the reorganization of the government and the extension of the merit system "upward, outward, and downward to include all positions in the executive branch of the government except those which are policy-determining in character." The program as presented calls for the modernizing of the civil service system by placing its administration under a single head and by establishing as the watchdog of the merit system a citizen board of seven members for seven-year overlapping terms. It is proposed also that salaries in the top career posts be increased from approximately $9,000 to about $15,000, so as to make these positions more attractive to men and women of superior ability. Under the plan, each department will have its own personnel administrator, as the best managed departments already do, and their work will be coördinated by the civil service administrator, whose relation to the President would be like that of the budget director at the present time. He would devote his attention to recruitment, the stimulation of training, promotion, and interdepartmental transfer.

There is no need of saying that the program, although criticized, particularly by individuals who have in the past made no contributions to the advance of civil service, has received the enthusiastic endorsement of those who have participated during the past five years in the renaissance of the movement for better government personnel.

If in the present sketch one factor stands out more clearly than another, it is this: To move democracy, you not only must develop the facts through research, but you must develop also the vocabulary of the leaders and the support of the masses.

LUTHER GULICK.

*Institute of Public Administration.*

**The Committee as an Instrument of Coördination in the New Deal.** Of all criticisms of the New Deal, the one most frequently emphasized is the lack of coördination. Headlessness in policy-framing and sprawling aimlessness in policy execution are twin charges which the Administration has been forced to admit. The recent report of the President's Committee on Administrative Management is an indication that the Administration intends to leave to posterity a good record on this score; but both prac-

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titioners and students of government are well aware that no reorganization can be so complete, so perfect in its functional allotment of duties to departments, that the problem of horizontal integration will not still need to be faced and solved. This reminder is less an apologia than an indication of the frame of reference of the present note; those who have been administering the government for the past four years have never been unaware of the need for concerted action among the executive departments, and many attempts have been made to achieve it. A device often employed for the purpose has been the interdepartmental committee.

Approximately 300 interdepartmental committees were in use between 1932 and 1936; and they were assigned every sort of duty, from framing legislative proposals to allotting wave-lengths to government broadcasting stations. In every case the committee was an attempt to bring together representatives of two or more departments for consultation and some sort of coöperative action; and although the committees cannot be forced into rigid categories, several rough classifications may be applied to them. The most obvious, of course, is the distinction between those committees used to achieve coöperation in business management and those which dealt with "service" problems—the familiar distinction between "institutional" and "functional" activity.[1] As between any two departments, it was soon found that in some cases there was needed only an exchange of information regarding each other's policies and activities; in other cases, the need was for parallel framing and execution of policy; and in a few instances, active coöperation was required. As soon as such need was recognized, and if there were available no more direct method of dealing with it, a committee was appointed.

The use of the committee as a device for achieving interdepartmental coöperation is not unique with the Roosevelt régime. Particularly in the area of managerial activity is this true; the Council of Personnel Administration was appointed in 1931, and the Interdepartment Radio Advisory Committee, the National Advisory Committee for Aëronautics, and the National Advisory Health Council, among others, antedate even the Hoover administration. However, aside from those that are continuing entities, interdepartmental committees have left but little spoor; even in the present administration, the number can be known with only approximate accuracy.

Interdepartmental committees have been set up in four ways: by act of Congress, by executive order, by letter or memorandum of the President, and by exchange of letters between cabinet secretaries. The third method has been most widely used, although the important committees have as a rule had the more formal authorization of executive order or statute.

[1] W. F. Willoughby, *Principles of Public Administration* (New York, 1927), p. 45.

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Perhaps the most realistic way of delineating in short space the characteristics of the interdepartmental committee will be to give thumbnail sketches of a few typical instances. The salient points of description must include the circumstances under which the committee was set up, the function it performs, its use of an executive secretariat, the essential features of its reporting procedure, and a word of estimate as to its success in fulfilling its assigned task.

*Interdepartmental Committee on Civil International Aviation.* This is the agency negotiating with various foreign governments for the establishment of proposed international air routes. Set up by executive order, the committee is composed of four assistant secretaries: R. Walton Moore, Department of State; Stephen B. Gibbon, Treasury; Harllee Branch, Second Assistant Postmaster-General; and John M. Johnson, Department of Commerce.[2] Behind the initial order is a story of several months of informal study and consultation by the State Department, both with other departments, with foreign governments, and with airline officials. An informal liaison was established by an exchange of letters between the Secretaries of State and Commerce on October 11, 1933, and inside the State Department a special committee was appointed to study the legal and diplomatic aspects of the proposed negotiations.[3]

The committee's task is simplified by the fact that only one airline in the United States is large enough to undertake a trans-oceanic air service; only Pan-American Airlines replied to the published notice of negotiations. The committee's procedure includes consultation with the Commerce Department to fix safety regulations for airports and travel inside the United States; with the Treasury Department to arrange customs inspection; with the Post Office to provide for transportation of mail; and with other departments not represented on the committee, as the War Department and the Immigration Service of the Labor Department. When these preliminary arrangements have been made, and when the legal divisions of the State and Commerce Departments have approved the form of the agreements, the Committee as a whole negotiates with representatives of the foreign government concerned. Negotiations terminate in an exchange of diplomatic notes embodying and agreeing to the provisions which the committee has worked out. The South American service and the route of the China Clipper were established in this fashion, and the committee is now working with several European countries.

The chairman of the group is R. Walton Moore, and the executive secretary, Richard Southgate, chief of the Division of Protocols and Conferences of the State Department. Most of the spade work for negotia-

[2] July 2, 1935; *State Department Press Release*, July 20, 1935.

[3] State Department Order No. 613, April 25, 1935.

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tions is done under Mr. Southgate's direction; the committee has no funds of its own, and its secretariat is financed on a contributory basis by the participating departments. The committee meets at about fortnightly intervals, depending on the pressure of work. It has never prepared a formal report; the chairman commonly reports in person to the White House, just before the conclusion of negotiations.

This group has functioned satisfactorily for over a year. The only alternative to the use of a committee would be to make the State Department responsible for the work and leave to the discretion of its officials the matter of consulting with other agencies. Such consultation was necessary at so many points that it seemed preferable to make it mandatory by setting up a special instrument for the purpose. However, it must be recognized that the effectiveness of the group is largely due to the leadership of the State Department, and particularly to the work of the secretariat.

*Emergency Conservation Work Advisory Council.* Set up by Executive Order to advise the director of the Emergency Conservation Work, this Council nominally includes the Secretaries of War, Interior, Agriculture, and Labor;[4] however, the secretaries have named as alternates those bureau chiefs actually engaged in administering the CCC. The active membership thus includes Mr. A. B. Cammerer, director of the National Park Service, Mr. F. A. Silcox, chief of the Forest Service, Col. George P. Tyner, General Staff, War Department, and Mr. Frank Persons, chief of the U. S. Employment Service. The Emergency Conservation Work has from the first been a coöperative enterprise; the Labor Department receives applications for jobs in the CCC, the Army enrolls, outfits, and trains those young men approved by the Labor Department, and the Departments of Interior and Agriculture furnish and supervise the projects on which the men are put to work. The function of the Council is to assist the director, Robert Fechner, in framing the policies under which the work is conducted; the Council has discussed the selection of work projects and assignment of allotted funds, preparation of the budget, finger printing of enrollees, eligibility of veterans, the problems of colored units, publicity work, and many other problems of varying importance.

The Council meets on call of the director; meetings were originally held weekly, but as the work was brought under control monthly meetings were found sufficient. Everyone directly connected with administration of the CCC attends; sometimes as many as 20 or 25 have been present. There is no secretariat, clerical help being furnished by the director's office. The director has issued one annual report, in the preparation of which the Council presumably assisted.[5]

[4] Executive Order No. 6101, April 5, 1933.

[5] Emergency Conservation Work, *First Annual Report* (U. S. Government Printing Office, December, 1936).

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The success of this Council in facilitating coöperation among the four departments participating in the Emergency Conservation Work has been rather marked. The word "facilitating" is used advisedly, for of course it is not the Council but the director and his staff that have actually administered the program. The Council has been a source of information to the director, a forum for discussion among the bureau chiefs, a clearing house for all decisions so that each department knew precisely what was going on. It has been responsible to the director, but its members were never coerced by him; the director has been guided by its decisions, yet apparently never hampered or delayed in action. The most satisfactory explanation for this phenomenon is the happy coincidence of organizational and personal factors; the job was well planned, and the officials selected were both competent and willing to participate fully. Responsibility for the work was put squarely on the shoulders of a single man, and the Council was brought in at the level where it could be of genuine aid—not in a supervisory but in an advisory capacity.

*National Advisory Committee for Aëronautics.* In quite a different category is the interdepartmental committee which administers the government's research in aviation. The Committee is practically an independent institution; it was established by act of Congress, over 21 years ago, "to supervise and direct the scientific study of the problems of flight, with a view to their practical solution."[6] The members are appointed by the President and serve without compensation; seven are private citizens and eight are government officials. The present membership includes Dr. Joseph S. Ames, Johns Hopkins University, chairman; Dr. David W. Taylor, Harry F. Guggenheim, Col. Charles A. Lindbergh, William B. MacCracken, Jr., Edward P. Warner, and Dr. Orville Wright, citizen members; from the government, Dr. Charles G. Abbott, Smithsonian Institution, Dr. Lyman J. Briggs, Bureau of Standards, Major-Gen. Benjamin D. Foulois, Chief of Army Air Corps, Lt.-Col. Henry C. Pratt, War Department, Willis R. Gregg, U. S. Weather Bureau, Rear Admiral Ernest J. King and Commander R. D. Weyerbacher, Navy Department, and Eugene Vidal, chief of Bureau of Air Commerce. The Committee meets six times a year.

The research work for which the Committee is responsible is managed by its research director, Dr. George W. Lewis, and its executive secretary, John F. Victory. The staff includes 315 paid employees at Langley Field, Virginia, 45 at Washington headquarters, and two in Paris; the Committee has a special annual appropriation, which for 1936–37 is $1,367,000.

The procedure of the Committee in working out a research program

[6] Act of Congress approved March 3, 1915; amended March 2, 1929; 50 USCA 151.

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begins with a technical subcommittee (of which there are eight), at the suggestion of some private laboratory or the Army and Navy air corps. The Committee selects from the projects approved by its subcommittees those which are most important, and the staff then frames the details of the research and selects a laboratory to handle it. Although most of the investigations are conducted at Langley Field, many are farmed out to universities and commercial laboratories. The results of the work are preserved in the Committee's four series of publications. Most of this material is kept confidential; Director Lewis submits it first to the Army and Navy to determine whether it has military value, in which case only 25 copies are typewritten and sent to a list of key men throughout the country. Non-military material is kept in the Committee's library and circulated to the government agencies, corporations, and individuals on the regular mailing list. The Committee also issues an annual report, addressed to the President for submission to Congress.

This Committee has many scientific achievements to its credit, and is interesting here as an example of interdepartmental participation in the direction of research. If the National Resources Committee is put on a statutory basis, it will probably use much the same sort of organization. The fiscal independence of this Committee should not obscure its very intimate relationship with the Departments of War and Navy; it is primarily an instrument of science, but the influence of its findings on policy cannot be ignored and contains significant implications for the national economy. This again would be true of the National Resources Committee.

*Shipping Policy Committee.* Research of a different sort was the function assigned to this temporary group, set up by memorandum of the Secretary of Commerce at the suggestion of the President, June 18, 1934, "to study in coöperation with nationally known shipping authorities broad questions relating to government shipping policy, merchant marine, and shipping code." South Trimble, Jr., solicitor of the Department of Commerce, was appointed chairman, with seven additional officials of the rank of assistant secretary or bureau chief from the Departments of State, Navy, Commerce, Post Office, Labor, and Agriculture. President Roosevelt wished this study made as a basis for legislation in the 1935 session of Congress; out of a conference with several cabinet secretaries there grew the idea of an interdepartmental committee, supported by contribution of services from the respective departments, to consult with shipping interests and prepare a comprehensive set of recommendations.

The Committee portioned out its task to subcommittee groups, each of which held hearings, and then came together after the data had been collected to discuss the general problems of shipping policy. No staff was used; clerical help was provided by the executive secretary, Thomas E. Lyons, chief of the Transportation Division, Bureau of Foreign and

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Domestic Commerce. A report was submitted to Secretary Roper on December 24, 1934, for transmission through the National Emergency Council to the President. Without going into the subject-matter of the report, it may be noted that the President incorporated its recommendations into his annual message to Congress on March 4, 1935.[7] Two bills on shipping policy were considered by the Senate and House Committees on Commerce; one was the proposal of Coördinator of Transportation Joseph B. Eastman,[8] the other the Presidential proposal based upon this report.[9] The Copeland bill merged these proposals, and the Merchant Marine Act as finally passed embodied most of the recommendations of the Committee on Shipping Policy with regard to a merchant marine subsidy program.[10]

Appraisal of a committee of this sort necessarily involves an examination of the validity of its recommendations. However, inasmuch as this committee typifies the machinery used to frame much of the New Deal legislation, its organization and procedure in shaping its report are also interesting. In this case, only governmental officials were used; frequently, however, experts have been appointed from outside the departments, as in the Committee on Economic Security. The interdepartmental committee has proved a very useful device for coördinating the preliminary study on which broad legislative programs are based; this is coördination of a different order from, but no less important than, that represented by the committee which clears legislative programs prepared independently by the departments. The latter type must frequently try to reconcile conflicting programs—an almost impossible task. Consultation among departments is apparently easiest in the earliest stages of legislative drafting, and it is at this level that the interdepartmental committee has been most successful.

*Interdepartment Radio Advisory Committee.* In the coördination of managerial functions, this committee is a clear-cut type. Set up by letter of the Secretary of Commerce to his cabinet colleagues in 1922, its most recent authorization was in 1933 by executive order.[11] The origins of the committee go back to the first National Radio Conference, when it was foreseen that some agency would be needed to assign broadcasting wavelengths to the stations operated by the executive departments. This is a function of the President,[12] and to keep it quite separate from the service function and policy-determining activity of the Federal Radio Commission, a separate instrument was created. The Committee is composed of technicians, one from each of the executive departments, the Inter-

[7] House Doc. 118, 74th Cong., 1st Sess.
[8] H. R. 5379, and S. 1632.
[9] H. R. 7321, and S. 2582.
[10] Approved June 29, 1936.
[11] Executive Order No. 6472, December 2, 1933.
[12] 48 Stat. 1083, 47 USCA, sec. 305.

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state Commerce Commission, the Federal Trade Commission, and the Federal Communications Commission, appointed by the ranking officer thereof for indefinite terms. Turnover in membership has been very slight, several of the original members still serving at the present time; and the chairman and executive secretary, who are elected by the Committee, have also held office for relatively long periods. The Committee has no funds, but is staffed on a contributory basis; it meets regularly at fortnightly intervals.

In performing its function, the Committee uses one technical subcommittee, to screen out the original applications for wave-length assignments. These applications, which originate in the bureau commanding the radio station and are signed by the department head, are considered by the Committee in open forum; the chairman has a deciding vote, but apparently assignments are made through amicable discussion on a basis of mutual give and take. There are no fixed policies of priority, for instance as between the Coast Guard and the Forest Service; there is some indication that an important secret fleet frequency of the Navy would be given the right of way, but this would be by general agreement. When the assignments have been made, they are embodied in an executive order, which is sent to the White House for the President's signature and which constitutes the Committee's only report. The Committee has no concern with the internal activity of the bureaus involved, and it shows no reflection of changes in administrations.

Perhaps the most significant factor in an appraisal of this committee is that its members are technicians, not policy men. The long tenure, absence of fundamental controversy, emphasis on routine, and ability to see the other man's viewpoint are all characteristics of the committee set up to coördinate managerial activity. Coöperation here is relatively easy; men who are engaged in identical work in different departments seldom have difficulty in finding common ground for discussion.

*Summary.* The five cases here presented include fairly typical examples of three major activities for which interdepartmental committees have been used: coördination of functional policy, research and planning, and coördination of institutional policy. Though such a compression of data as this scarcely affords a basis for generalization, a word of comment is necessary to indicate the place of interdepartmental committees in the coördinating process. The use of committees will not cease with 1941; rather, the unmistakable trend toward broad social programs will bring a wider use of them (a) because it will increase the need for the framing of policy by more than one executive department, (b) because it will increase the number of administrative agencies. It is therefore imperative to define the uses to which a committee may properly be put.

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The general criterion by which the success of existing committees must be judged is their ability to agree upon a policy which will thereafter be adopted as the policy of each of the participating departments. It is also possible to frame subsidiary criteria for estimating how well the committee has performed its assigned function. The committees here described have all been reasonably successful, but in this they represent a woefully small minority. Taking a broad view of the 300-odd interdepartmental groups in existence between 1932 and 1936, four facts must be admitted: (1) many committees were created for functions which no committee could fulfill; (2) many were handicapped from the start by unwieldy size, thoughtless appointment of personnel, or lack of adequate or definitive authority; (3) duplication of effort among committees was almost as widespread as among executive agencies; and (4) the process of appointment and organization was utterly haphazard, resulting in great loss of energy and time. At most, a third of the committees appointed performed some valuable service.

But the successful committees are understandable only in comparison with the failures; again viewing the situation as a whole, there are apparent certain characteristics of the effective and the ineffective type which may assist in answering the fundamental query: Under what circumstances is an interdepartmental committee really useful? In the first place, the committee may be used only where *discussion* is essential and appropriate; where haste, or secrecy, or decisive action are the primary desiderata, some other mechanism may as well be found at the outset, for it will have to be found in the end. Second, the problem must be one requiring *over-all consideration;* it is sheer waste of time to formalize an interdepartmental group where the matter can be handled by a single department through individual consultation. Finally, the *organization* of the committee must be carefully planned in the light of its function and the two points just mentioned. The number of members should be kept small enough to be manageable, yet large enough to be inclusive; members should be appointed with an eye both to competence and personality, rather than merely naming the first person who comes to the Secretary's mind as being generally capable. If a secretariat is used at all, it should be more than a mere recording agent; its contribution should include (a) continuity, by drawing together the threads of the work from the subcommittees and from one meeting to the next, and (b) vitality, by digesting the discussions of the committee and subcommittees to furnish the right word at the right moment and fresh ideas when possible.[13]

[13] The Central Statistical Board, which alone would furnish material for a monograph on coördination, is the outstanding example of effective staffing.

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A thorough study of coördination must view the problem of interdepartmental concert from two angles: the achievement of parallel action, which is the concern of the present note; and the effects of conflicting action, which is a far broader field. To trace the coördinating process from the specific circumstances which bring into being an interdepartmental committee (or other mechanism) all the way through to the implications which conflicting policies hold for the entire national economy, is perhaps the highest objective of such a study. It is an objective that can be attained only by a series of systematic studies analyzing the mechanisms of administrative coördination in action.

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# NEWS AND NOTES

## PERSONAL AND MISCELLANEOUS

*Compiled by the Managing Editor*

A committee on program for the Philadelphia meeting of the American Political Science Association next December has been appointed as follows: Professors Francis W. Coker, Yale University, chairman; William Anderson, University of Minnesota; Cullen B. Gosnell, Emory University; Lindsay Rogers, Columbia University; and James T. Young, University of Pennsylvania. One or two other persons may be added. Professor John M. Gaus, University of Wisconsin, has been made one of the Association's three representatives in the Social Science Research Council, and Professor Joseph P. Chamberlain, Columbia University, has been reappointed as one of its two delegates to the American Council of Learned Societies. The Committee on Policy for the year had not been made up fully at the date of writing, but will include Professors Arthur N. Holcombe, Harvard University, chairman; A. B. Butts, University of Mississippi; Kenneth Colegrove, Northwestern University; and Thomas Reed Powell, Harvard Law School.

The 1937 edition of the Political Science Personnel Service was ready for distribution to administrative officers and heads of departments in high schools, colleges, and universities and to government officials early in April. This Service includes the records of graduate students and young doctors of philosophy who are prepared to take teaching positions or research and governmental posts. The Service is distributed free of charge on application to the Secretary-Treasurer, 305 Harris Hall, Northwestern University, Evanston, Illinois.

Professor John A. Fairlie returned from a European trip in December and resumed teaching at the University of Illinois at the beginning of the second semester.

Professor Raymond Moley, who in addition to teaching at Columbia University edits *News Week*, will be on sabbatical leave from the University in 1937–38.

Professor Austin F. Macdonald, of the University of California, went abroad in January and will remain until the opening of the fall term.

After teaching at Stanford University during the autumn and winter quarters, Professor Clyde Eagleton, of New York University, went to the Far East for several months of travel and observation.

Following a two-years' leave of absence from the University of Arkansas, Professor Kenneth O. Warner has resigned to continue as field consultant with the American Municipal Association.



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Professor E. Allen Helms, of Ohio State University, participated in the public forum program sponsored by the Office of Education in Morgantown, West Virginia, during the month of February.

Dr. Hyman E. Cohen has returned from his year abroad as a fellow of the Social Science Research Council, studying emerging political tendencies and thinking in Europe. He is now research associate and instructor in the department of political science at the University of Chicago.

Dr. Clarence A. Dykstra, city manager of Cincinnati since 1930, and formerly professor of political science at the University of Kansas (1909–18), and the University of California at Los Angeles (1923–29) has been chosen president of the University of Wisconsin and will enter upon his new duties in May.

Professor Emery E. Olson, dean of the school of government at the University of Southern California, and lately on leave in connection with the in-service training project for federal employees in Washington, D. C., sponsored by the American University, will return to his post at Los Angeles at the beginning of the next academic year. Meanwhile, during the coming summer, he will serve as director of the second annual Institute of Government at the University of Washington, Seattle.

Mr. Robert Smith, formerly personnel technician of the Farm Credit Administration, has been appointed director of personnel in the U. S. Department of Labor, which now becomes the second "old line" federal department (Agriculture being the first) to establish a personnel office.

Professor Jesse S. Reeves has resigned the chairmanship of the department of political science at the University of Michigan, held by him since the department was first organized in 1910. His successor is Professor Ralston Hayden, who a year or more ago returned to the University from the vice-governorship of the Philippines.

Dr. Fannie Fern Andrews has returned to the United States after a four-months' study of the "danger zone" of Europe, during which she visited Paris, Munich, Prague, Warsaw, Danzig, Berlin, Cracow, Vienna, Budapest, Trieste, Rome, Milan, and Geneva. Her plan of investigation included chiefly interviews with foreign offices. More recently, Dr. Andrews has been delivering sundry lectures on European diplomacy.

Training of students for service in state and local government, particularly in Pennsylvania, has been made one of the functions of an Institute of Local Government organized recently at Pennsylvania State College. Dr. H. F. Alderfer is serving as special adviser to students taking the course.

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With the assistance of W.P.A. funds, the Bureau of Governmental Research at the University of Washington, Seattle, is undertaking a survey of local government in the state of Washington. Local government functions, both administrative and financial, will be examined. From seven months to a year will be required to collect and interpret the necessary information. Dr. Edmund F. Spellacy, associate professor of political science, is acting as research director.

The United States agency for documents published by the League of Nations, the International Institute of Intellectual Coöperation, and the Permanent Court of International Justice has been transferred from the World Peace Foundation to the Columbia University Press, which now maintains a special division known as the International Documents Service.

The U. S. Northwest Territory Celebration Commission is offering a cash prize of one thousand dollars for "the best standard work, in manuscript form, covering the history of the Ordinance of 1787 and its effects upon the development of government," and submitted to the Commission at its office in Marietta, Ohio, on or before June 1, 1938.

*Amerasia; A Review of America and the Far East* is a valuable new monthly magazine published at 125 East 52nd St., New York City, under the managing editorship of Philip J. Jaffe and the sponsorship of an editorial board which includes Frederick V. Field, T. A. Bisson, Cyrus H. Peake, Owen Lattimore, Kenneth Colegrove, and William T. Stone. The first issue appeared in March.

Pi Sigma Alpha, national honorary fraternity in political science, held its biennial meeting in connection with the American Political Science Association meeting at Chicago in December. Thirty delegates representing sixteen of the twenty-seven chapters were present. The following officers were chosen: president, Harvey Walker, Ohio State University; vice-president, Charles W. Shull, Wayne University; secretary-treasurer, J. W. Manning, University of Kentucky.

A new guide to the Federal Archives of the United States is being compiled by members of the staff of the National Archives on the basis of information assembled by the deputy examiners in their preliminary surveys of the material in Washington and by the W.P.A. Survey of Federal Archives in its inventories of records outside the District of Columbia. The guide will be published in parts as completed, and each will describe the records, both in and out of Washington, of one of the major agencies of the government or of a group of minor agencies.

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The tenth annual session of the Emory University Institute of Citizenship was held at the University on February 8–12, under the direction of Professor Cullen B. Gosnell. The lecture staff consisted of Dr. Raymond L. Buell, Foreign Policy Association; Dr. Thomas H. Reed, National Municipal League; Professor Edward S. Corwin, Princeton University; Mr. Edwin R. Embree, Julius Rosenwald Fund; Mr. Francis B. Sayre, Department of State; and Mr. Murray Seasongood, ex-mayor of Cincinnati, Ohio. Round table leaders included Professors Frank W. Prescott, University of Chattanooga, and George Spicer, University of Virginia.

With "The World Challenge to Democracy—How Can America Meet It?" as the general theme for its lectures, forums, and round tables, the Summer Institute for Social Progress will hold its fifth annual conference for men and women on July 19–24 on the campus of Wellesley College. Dr. Colston E. Warne, professor of economics at Amherst College, will be head of the Institute faculty this year, and will be assisted by other experts, chosen not only for their knowledge of their respective fields but for their ability to stimulate pertinent discussion. The conference offers an opportunity for political scientists to come together with men and women active in the industrial, business, and professional worlds, all of whom bring their personal practical experience to bear on current economic and social problems. Details may be had from G. L. Osgood, 14 West Elm Avenue, Wollaston, Mass.

The first number of *Population Index*, a guide to current demographic materials for students, research workers, and teachers, appeared in January. The *Index* is published quarterly by the School of Public Affairs, Princeton University, and the Population Association of America. It continues the Association's bibliography, *Population Literature*. The current number contains two new sections, Current Items and Statistics, in addition to a bibliography covering more than 400 recent books and articles. Current Items is devoted to notes on matters of special interest to students of population, such as announcements or reports of meetings and comments on new developments. The Statistics section presents population and vital statistics for a large number of countries as well as special data for the United States. The *Index* goes to all members of the Population Association. Others wishing to receive it may write to the Office of Population Research, 20 Nassau Street, Princeton, New Jersey.

Sir Frederick Pollock, preëminent among the legal scholars of the English-speaking world in his generation, died at his home in London on January 18 at the age of ninety-one. From his death-bed, he advised

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Sir John Simon on the form which King Edward's abdication should take. Editor of the *Law Quarterly Review* from its establishment until 1918 and of the *Law Reports* for forty years, author of many text-books and treatises widely used in law schools, and lecturer on legal subjects in many lands including India and America, he was perhaps best known to political scientists by the *History of English Law* which he wrote in collaboration with Professor Maitland, his *Essays in Jurisprudence and Ethics*, and, not least, his *Introduction to the History of the Science of Politics*, telling in a hundred brilliant pages of the ways in which men have conceived the state since Aristotle, and unequalled in any language as an introduction to the subject.

Dr. James Quayle Dealey, professor of social and political science at Brown University from 1895 until he reached the retiring age in 1928, died at his home in Dallas, Texas, on January 22 at the age of seventy-five. Born in Manchester, England, Dr. Dealey engaged in newspaper work in Galveston, Texas, before going to Brown as a student, and after receiving his bachelor's degree in 1890 taught languages in Texas and Vermont before taking the post at Providence with which the political science profession associates him. After his retirement, he returned to Texas, where, at the time of his death, he was editor-in-chief of the *Dallas Morning News* and allied publications. From 1916 to 1928, he served as lecturer at the Naval War College at Newport, Rhode Island; in 1932–33, he was president of the Southwestern Social Science Association; and his publications included *Our State Constitution*, *The Development of the State*, *Ethical and Religious Significance of the State*, *The Growth of State Constitutions*, *Foreign Policies of the United States*, besides works in the field of sociology, to which he was drawn through his association with Lester F. Ward.

**A Graduate School of Public Administration at Harvard University: Committee Recommendations.** In November, 1935, Harvard University announced a gift of two million dollars from Mr. Lucius N. Littauer for the establishment and maintenance of a Graduate School of Public Administration. In pursuance of this benefaction, President Conant appointed a special commission to prepare recommendations concerning the organization of the new school, the scope of its work, and its proper articulation with the existing schools and departments of the University. In view of the significance attaching to the resulting recommendations, considerable portions of the document are presented herewith:[1]

[1] The members of the commission were: Harold W. Dodds, Princeton University, chairman; Leonard D. White, U. S. Civil Service Commission; William B. Munro, California Institute of Technology; and Wallace B. Donham, Harold H. Burbank, and Morris B. Lambie, Harvard University. The initial staff of the school, organized

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I. The Commission believes that there are sufficient opportunities in the public service to warrant the training of men by Harvard University for careers in it. Provisions should therefore be made for a new curriculum or for such adaptation of existing curricula as will provide this training in an effective way.

II. Such new curriculum or adaptation of existing ones can best be provided under the sponsorship of a separately organized Graduate School of Public Administration.

III. The objectives of this new school should be not only to provide an adequate program of training for public service but to promote research in public administration as well. Special emphasis should be laid upon this latter purpose, because there is need for scholarly and objective investigation into the problems of public administration and because it is now recognized that research is a vitalizing factor in all forms of training at the graduate level. It is research that helps to create the atmosphere of intellectual earnestness which the new school must have if the training given by it is to be commensurate in standards with that of the other graduate schools and departments at Harvard.

IV. The new school should be organized with a dean, a separate faculty, its own curriculum and degree, as well as its own separate budget. Most of the faculty members of the new school may well be, at the outset at least, members of the existing faculties of the University. These instructors will thus be in a dual relation—to the new school on the one hand and to their own departments or professional schools on the other. At the beginning, the instructional staff of the Graduate School of Public Administration need not include more than three or four instructors whose association is primarily with the new institution . . . . Together with these three or four persons, the faculty of the school should also include men selected from other faculties of the University, making a group of not more than twelve or fifteen at the outset. This limitation is desirable in order that the faculty shall be small enough to permit frequent, frank, and informal discussions of the many problems of educational policy which will confront the school in its formative years . . . .

V. It is extremely desirable that the new school be inaugurated with a small enrollment in order that it may (a) secure for itself a highly selected group of students, (b) facilitate the placement of its graduates, and (c) afford opportunity for gathering new instructional data, as well as for developing such methods of instruction and research as may be found

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since the report was submitted, consists entirely of persons who at the time of their appointment were already members of the Harvard faculty and includes, among others, Arthur N. Holcombe, Carl J. Friedrich, and Morris B. Lambie, with E. Pendleton Herring as secretary.

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most appropriate to this new educational enterprise. Accordingly, the Commission expresses the earnest hope that at the outset the enrollment will not include more than ten to fifteen in category *1a* (as described in the following sections), ten to twenty in category *1b* (depending upon whether additional funds can be obtained for assisting students in this group), and in category *2* not more than are in categories *1a* and *1b* combined.

The three classes of students who may be expected to take courses in the new school are as follows:

*1a.* A limited number of carefully selected recent college graduates who may or may not have had some professional or graduate training. In all instances, a genuine desire to enter the public service should be indicated by these students as a prerequisite for admission to the school. It may also be desirable to have some assurance of a secondary interest, for example, in teaching, business, research, public relations, or writing as alternatives to a place in the government service. These students should be encouraged to arrange programs of general educational value so that on completion of their work they will not have unprofitably utilized their time in case they do not enter the public service.

*1b.* A small group of men already in the public service who are college graduates and who would gladly seek leave of absence for the purpose of spending at least a year in the new school . . . . The Commission regards provision for this class of in-service students as of the highest importance not only to the improvement of the public service but to the creation of a professional spirit in the school during its early years. Such mature students, on leave of absence from their posts in the national, state, or municipal service, would provide the school with a nucleus which would facilitate the setting of high standards from the very outset. The purpose of their coming to the new school would not be to improve their proficiency in the special fields of work which they have been following, but rather to broaden the area of their competence and thus to qualify them for promotion to positions of wider administrative responsibility. The Commission believes that the offering of liberal opportunities to such a group of promising young public officials constitutes perhaps the greatest service which the new school can render. It regards this project as of such importance that if the available income is not sufficient to provide fellowships in adequate number and amount, it recommends that additional funds for this purpose be sought at once.

Both the foregoing categories (*1a* and *1b*) include students whose affiliation would be primarily, if not wholly, in the new school. But in addition there should be admitted a second group of students, namely:

*2.* Men who are pursuing or have finished their graduate or professional work and who desire to obtain additional training in the field of

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public administration. Such students will in most cases continue to be enrolled in one of the existing graduate schools or departments of Harvard University, but will take in the new school such courses as might be approved by the dean or chairman of the school or department in which their regular graduate or professional work is being carried on. The Graduate School of Public Administration would serve these students by suggesting courses which would be advantageous to them, either chosen from its own curriculum or from the instruction which is already provided elsewhere in the University. Those who have not finished their regular graduate or professional training would continue to be registered as before, and would come to the new school for individual courses only.

If the foregoing recommendations are followed, the new school will begin with a relatively small enrollment, not exceeding forty to seventy students in all. It ought to remain relatively small for a time, at least until the successful placement of its graduates is fully assured. Nothing could be more unfortunate than that the school should turn out graduates for whom positions in the public service are not available. The expansion of the school should proceed slowly and cautiously, in order that the pitfalls which beset a new educational experiment may be avoided.

VI. The exact scope and character of the curriculum should, of course, be determined by the dean and faculty of the new school. It is strongly urged, however, that the curriculum should not attempt to provide highly specialized preparation for individual branches of the public service. It should not attempt to train its students in such way that they will deem themselves qualified to enter the public service as expert technicians in any branch of it. It should carefully avoid becoming a place of vocational training in the narrow sense. Rather it should seek to provide a thorough grounding in the fundamental principles and problems of public administration without reference to the branch of the public service which its graduates may enter, although career men on leave (group *1b*) may properly orient their work more definitely than recent graduates. This training, while it will necessarily familiarize the student with many administrative problems of a specialized character, should be primarily designed to give him a grasp of public administration in its broader phases as a branch of the science of government. The methods of instruction should be adapted to the attainment of this purpose . . . .

VII. If the school is to perform a distinctive function, it must provide itself with a body of instructional data which is not now available anywhere. To this end, it is strongly recommended that before the work of instructing regular full-time students (such as those envisaged in class *1a*) is begun there should be a period of a year or more during which the new school would devote practically its entire energies to the task of becoming familiar with the problems confronting it and developing an effective

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instructional technique. Its initial staff would be greatly helped in this direction by bringing into the school, during this preliminary period, a small group of men who already hold high positions in the federal, state, or municipal service. It is suggested that in each half year the federal and state authorities might well be asked to release a small number (say eight or ten) bureau chiefs or other "career officials" of correspondingly high grade. These officials would devote perhaps half their time to participation in round-table conferences with the initial faculty of the school on such matters as are to constitute the projected courses on Public Policy, Public Administration, etc. Their remaining time would be spent in pursuing such work as they might choose to take in the Graduate School of Arts and Sciences, the Graduate School of Business Administration, the Law School, or in some other graduate or professional school at the University.

Various advantages would be derived from this arrangement. The faculty of the school would be assisted in the preparation and testing of instructional data. With the assistance of these officials, drawn from the high ranks of the public service, a realistic program of research could be formulated. Contacts between the faculty of the school and the public service would be facilitated.

If the foregoing suggestion is followed, it is recommended that the small group of public officials be brought to the school as soon as possible, and in any case not later than September, 1937. Students in class *1a* should not be admitted until September, 1938; but students in class *1b* and class *2* might well be permitted to enter the school in small numbers during the school's initial year . . . .

VIII. . . . It may be appropriate to point out the importance of building up among the students an *esprit de corps* or morale, so that they may look upon their impending careers as an opportunity for service to the public rather than as a mere means of earning a livelihood. They should be impressed with the dignity of the public service as a profession, and should be encouraged to maintain after graduation close and familiar contacts with the graduate school and the members of its faculty. It is consequently important that the members of the faculty themselves recognize the dignity and significance of the public service in our contemporary social structure.

IX. The Commission regards it as essential that the new school should give its own master's degree to those students who have satisfactorily completed the requirements of a two years' course. For a number of years at least, or until the school has become well established, it ought not to recommend candidates for a doctor's degree. The Commission suggests for consideration by the faculty of the new school the advisability of providing certificates in public administration to those students who have

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completed a substantial amount of work in the school but have not been candidates for its degree.

X. Because of the experimental character of the new school, it is important that the coming year be energetically devoted to the selection of the dean and faculty, the preparation of instructional data, preferably with the aid of the officials mentioned in Section VIII, the development of the nucleus of a library, the working out of arrangements for the selection and admission of students, the erection of a building to be known as the Littauer Center, and the establishment of coöperative relations with other schools and departments of the University as well as with governmental agencies. *It is far more important that the work of training students be started right than that it be started early* . . . .

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*Intelligence in Politics.* By Max Ascoli. (New York: W. W. Norton and Company. 1936. Pp. ix, 280.)

This essay of interpretation, and of not always suppressed but never strident appeal, should be studied by American political scientists. Professor Ascoli has already won a place here through his writing and his teaching; and now he brings us the first fruits not only of his observations of America, but of his equally valuable informed awareness of other systems, institutions, and cultures in which he has been reared. We have had valuable essays on America in the past by writers who also have been able to place some knowledge of our society in relation to that native to them. What distinguishes this book is the eagerness of its author to participate in the work of the American student of social institutions, an eagerness that in certain passages—notably those on pages 205, 279, and 280—rises to a moving and genuinely inspired quality all too rare in our professional writing.

For this is, indeed, professional writing. It is addressed to the "intellectuals," and particularly those who are social scientists, and it aims to clarify their function. Even more particularly, it seeks to explain their peculiar function in America as the society in which democracy offers to those who will make the effort the richest opportunities for observation and participation. The opening chapter defines the function of the intellectual in general (as a "technician in expression"), the problems peculiar to him in democracy and capitalism, and the resulting bewilderment which characterizes him. There follows a penetrating discussion of democracy in America, with an appraisal of the rôle of the parties, the common law, and the courts. The emphasis laid on politics as ultimately more important than economics should be noted. "Politics, no matter how poorly managed and how corrupt, is without comparison more far-seeing than economics." The analysis is continued in the third chapter, where the "dilution" of politics is described in the "marriage between democracy and business" and the absorption of varied peoples and dissents. The problem of assimilating, understanding, and stating the resulting and present American society and its institutions—the prime task of the intellectual—is discussed in the fourth and concluding chapters.

At first reading, the exuberance of aphoristic sentences—there are many aphorisms that invite quotation—sometimes distracts attention from the penetration with which the author has not only interpreted our institutions but brought his understanding of another society to their appraisal as a native could not. But the aphorisms are not callow; they invite reflection. The concrete illustrations are very few; the reader is given little mercy in the way of extended concrete descriptive data to



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clinch the argument, except—and most effectively—in a few references such as that to the Civil War, or to the fact that "one does not fight the reactionary justices with the arguments of Brooks Adams, but with the opinions of Holmes."

"Intelligence has refused to comprehend democratic politics and to accomplish in itself the changes necessary for the grasping of it"—this is the challenge of the book that gives it a place in the reading of the political scientist. "A democratic political régime can be more seriously endangered by malicious or fatalistic interpretations than by riots"—yet "intelligence here has been prevented from falling into arrogance, and politics has not yet passed beyond the grasp of human control." There is, in this conception of the task of the intellectual, and despite the state of the world, no whining and no defeatism.

There is an apparent contradiction, it may be argued, in Professor Ascoli's insistence on reason as against fatalism or other escape as the instrument of the intellectual and his equal insistence that the tendency of politics in a democracy "is to run secretly and wild, to eliminate consciousness of purposes and rules of the game." Yet the contradiction can be resolved, as a growing number of studies, such as Merriam's *Chicago*, for example, illustrate. Professor Ascoli's warning that the intellectuals "must look in themselves, among themselves, within their own ranks, in their own domain" has reference to a rejection of the "auspices of racial trends or economic laws." These may be a portion of the data of politics; but they need to be informed by the inventive and creative interpretation of the political scientist. How costly our national depreciation of politics and the politician is, it is our function to make clear. The attack upon what is asserted to be irrational is itself a flight from a difficult task of reason. While portions of Professor Ascoli's analysis of this problem are not easily grasped—notably in Chapter IV—we must remember not only that the problem is complex and difficult, but that we have neglected it too long.

JOHN M. GAUS.

*University of Wisconsin.*

*The Rise of Liberalism.* By HAROLD J. LASKI. (New York and London: Harper and Brothers. 1936. Pp. 327.)

In this volume, Mr. Laski aims to trace the growth of liberal ideas and the forces by which they were shaped into a coherent doctrine, and to explain the paradox by which business men changed from a liberal to a conservative point of view in their political outlook. It is the story of the rise of a capitalist society, of the attitude of the growing middle class who controlled that society and who, in the earlier period, created liberal and even revolutionary ideas for the purpose of overthrowing the old

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order, controlled by the landed nobility and the church. For a time, during the period of Mercantilism, they supported the authority of the monarchs of the new national states, with their interest in trade, colonies, and new enterprises. Later, as their political influence increased, they placed constitutional restrictions upon state power, demanded a sphere of individual freedom and a moderate degree of democracy. With the further extension of political power to the masses and the rise of socialist doctrines, they became an entrenched minority group, possessing economic power and determined to keep it, using liberal phrases to support their desire to run their business in their own way without regulation or control. What was at first a critical and destructive attitude thus became in the course of four centuries a distinctly conservative point of view.

From this outline, it will be seen that the author identifies liberal principles with the desire for freedom on the part of men who had property to defend. As he states it, "The idea of liberty is historically connected with the ownership of property. The ends it serves are always the ends of men in this position" (p. 9). He admits that liberal doctrines took various forms, changed from century to century, and were composed of divergent elements. He recognizes their skeptical attitude to dogmatic religion, their hostility to tradition and to standardized social control, their interest in science and invention, and in the importance of the individual. He sees the change between the liberal's support of state promotion of business in the sixteenth century and his demand for laissez-faire in the nineteenth century, and between his support of moderate democratic ideas in the period of the English and French Revolutions and his opposition to wider democracy today. The author finds the explanation in the statement that while liberal ideas have expressed themselves in general and universal terms, they have always been used in practice for the benefit of a limited property-owning class.

At the present time, the author sees a clash between political democracy and economic oligarchy, and a realization by the propertied classes that if they continue their liberal experiments and reforms they will destroy their own power. Hence the decline of liberal theories, the growth of fascist doctrines to support capitalism, and of communist theories in the interest of economic equality. Liberalism grew out of the efforts of the middle class to find its place in the sun. Having accomplished this, it was unwilling to make room also for the laboring class, and the doctrines which were once used to free the middle class are now used to discipline the workers.

This thesis is developed by the author in his usual brilliant and suggestive manner. He touches on theology, literature, science, history, political and economic theory—the names of about two hundred writers are mentioned. Sometimes this parade of erudition seems a little unnecessary. In

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the notes at the end of the volume are modest references to eleven other works by H. J. Laski. In the opinion of the reviewer, too much emphasis is placed upon the economic interpretation of history throughout the volume; and the assumption that liberal ideas were always used to defend the rights of property seems unwarranted. Certainly much of the development of liberal principles, especially in France, was the work of men who had little property to defend, and liberal ideas have been used for other and sometimes for opposite purposes—to attack as well as to defend the right of property. While admitting the value of Mr. Laski's broad generalizations and the suggestiveness of his point of view, there is left the impression that he started with a well-defined preconception and that he omitted many things that do not fit in with the main line of his argument.

RAYMOND G. GETTELL.

*University of California.*

*The Social Contract; A Critical Study of Its Development.* BY J. S. GOUGH. (Oxford: The Clarendon Press. 1936. Pp. vi, 234.)

This is a keen and painstaking investigation into the origin, biblical and classical, of the contractual ideas which found their first great synthesis in the Middle Ages, and through the Renaissance and the bourgeois revolutions shook the foundations of the divine right of kings until, in the nineteenth century, they lost their hold on public opinion because of the growing spirit of historicism, empiricism, and relativism. Though the approach of the author is in its essence historical, his achievement is far more than this. In the first place, he often gives very penetrating critical analyses of the doctrines from the point of view of their logical correctness (a detailed discussion of Professor C. J. Friedrich's interpretation of Althusius will interest the American reader particularly). In the second place, he is perfectly aware of the fact that the continuous recurrence of the contractual theories and their tremendous influence on modern democracy, federalism, and international law cannot be a purely transitory historical attitude, but must have a deeper foundation in the essence of the human soul and institutions. Against a shallow positivism, he pertinently asserts that "in politics as much as in any other branch of philosophy, there is an absolute and not merely a relative distinction between truth and falsehood, good and evil, and that that is a question which history alone is powerless to answer."

The reviewer can only express his unqualified praise for the clarity, precision, and conscientiousness with which the author has done justice to the great array of controversial ideas which he treats in his long historical travel. His book will surely become an indispensable guide for all those who approach some aspect of the contractual theory. In all his

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analysis, Mr. Gough makes a sharp distinction between the social contract proper and the contract of submission which an important part of the theory has emphasized. As to his other claim, "not to lose sight of the importance of judging a political theory in the light of its circumstances," our appreciation is less emphatic. It would seem to the reviewer that the author has embraced too many minor prophets of the contractual theory, with the result that the reader sometimes loses among the bewildering amount of details the essential and fundamental developments. One does not feel that emotional pulsation of the theories which alone makes them an instrument of the creative historical process and without which it only remains the object of esoteric debates and classroom exercises.

As to his final conclusions—the results of his laborious inquiries—though suggestive and illuminating in many respects, the author's point of view seems to be somewhat incomplete and vacillating. For instance, the historical validity of the contractual theory cannot be repudiated by the simple fact that we have no evidence of the contractual origin of the state. The only real test here would be the judgment of the anthropologists, which is, however, lamentably contradictory. But if we assume, for example, with the school of Sir G. Elliot Smith, corroborated by a great array of facts, that the original condition of mankind was not the somewhat mythical horde but rather the anarchy of extremely individualistic families, the social contract idea would receive an almost historical support—of course not that of a formal state contract, but in the sense that every enlargement of the social bond which was not based on conquest must have furnished new opportunities for mutual aid and coöperation. Every common defense, every coöperative hunting expedition, or fight against animals or nature, can duly be regarded as a more or less conscious contract for mutual benefit, accepting reciprocal rights and duties. Did the contractual theory, in its essence, ever mean more than this? What other contract could millions of citizens, the greatest part of whom have never known one another, have entered than this? As a matter of fact, the contractual theory was always a protest of the spirit of free coöperation and equal human dignity against the spirit of conquest and hereditary superiority; at the same time, a continuous approach towards the ideal, magnificently stated by Rudolf Stammler: "Eine Gemeinschaft freiwollender Menschen."

Of course, this remark should not be interpreted as a reproach to the author. No one can give a final well-balanced judgment of the contractual theory without taking into consideration that proud edifice of which the contractual theory forms only one bulwark, i.e., the theory of the Law of Nature. The author fully realizes this, and it is highly desirable that he should embark in the future upon the most important task: to show the

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living and permanent force of a theory destroyed by power-worshipping jurists and the admirers of a "Rechtswissenschaft ohne Recht" of the totalitarian state.

OSCAR JÁSZI.

*Oberlin College.*

*Otto von Gierkes Staatslehre und unsere Zeit.* By REINHARD HÖHN. (Hamburg: Hanseatische Verlagsanstalt. 1936. Pp. 161.)

The innocent scholar might assume that there is much in Gierke that might be useful to those attempting to translate into theory the vague but vigorously asserted convictions of the National Socialist movement. For Gierke was both an outstanding opponent of nineteenth century individualists and formalists and also the great Germanist among the jurists of his day; and Dr. Höhn does mention present German writers who, recognizing this, are attempting to build a theory for the totalitarian state on the foundation of Gierke's doctrines.

But this "back to Gierke" movement Höhn considers a waste of time, if not an attempt to undermine National Socialist thought. Gierke was too much of an individualist for Höhn. For Gierke, the development from primitive *Genossenschaft* to modern *Körperschaft*—that is, the development of a conception of corporation as resting on a voluntary basis, comprehending selected spheres of individual interest and activity, and possessing a real, if invisible, personality distinct from that of its members—was a significant achievement of centuries of German social progress and persistent efforts to conserve and develop Germanic concepts in law and politics. But Höhn regards all this development as intolerable retrogression. He would go back, not to Gierke, but to the primitive German *Genossenschaft* with its concrete, visible *Gemeinschaft*-unity, which exists in and comprehends the complete personalities of its members (pp. 21, 27, 41–42). He insists repeatedly that the unity of the state is in the visible *Volksgemeinschaft;* there is no need to abstract an invisible juristic personality for the state (p. 70). This approach enables him to eliminate as irrelevant to National Socialist thought problems which Gierke found basic, such as the rôle of the constitution in the *Rechtsstaat* (pp. 48–51), the relations of individuals to the state (pp. 53–58), the theoretical position of the organs of an association (pp. 66–70), the distinction between public and private law (p. 83), and so forth. Such questions, says Höhn, arise from Gierke's individualist assumption that different phases of individual personality are separable, and from his consequent substitution of the *Körperschaft* for the simple old-German *Genossenschaft* as the core of his system. The pluralism implicit in Gierke's thought makes it utterly foreign to the totalitarian ideal (pp. 108–109, 149). Finally, Gierke has no room in his legal system for "race, blood, and soil" as the necessary

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basis of the state (p. 152). Nor is there room in Gierke's system for a *Führer*, except as an organ of the *Körperschaft* (pp. 76, 152). Gierke's system thus becomes the last great barricade which opposes the triumphant march of National Socialist theory (p. 8).

Höhn's exposition of Gierke is objective and well illustrated by direct quotation, but the necessity of maintaining his thesis leads him to a one-sided interpretation which neglects the importance in Gierke's system of organic and authoritarian elements. The book emphasizes the gulf between liberal conceptions of law and state and the assumptions of German totalitarianism; and to many it will be interesting as an unintended vindication of Gierke.

JOHN D. LEWIS.

*Oberlin College.*

*The Papacy and World Affairs, as Reflected in the Secularization of Politics.* BY CARL CONRAD ECKHARDT. (Chicago: The University of Chicago Press. 1937. Pp. xiv, 310.)

The appearance of this book is timely in view of the uncertain status of the Catholic Church as an international institution in relation to the totalitarian fascist states and the rallying of the forces of Catholicism by the Vatican in opposition to communism.

The author narrates the successive steps in the secularization of politics from the Avignonese period to the Lateran Accord of 1929, and in the concomitant decline of the Pope's influence in temporal affairs. As the title indicates, the book deals primarily with the international position of the papacy, and therefore the largest amount of space is allotted to the Peace of Westphalia, which, owing to the unprecedented inclusion of the clause against papal protests in the treaties, marks the beginning of a concerted and effective opposition on the part of Catholics as well as Protestants to papal pretensions to hegemony in the affairs of Europe.

This part of the book is well done and deserves commendation. It presents material taken largely from original sources. It is more than a mere compilation of factual data and a presentation of the political arguments of official apologists. An attempt has been made to interpret this phase of history in terms of underlying purposes and motives by pointing out the dynastic and personal interests and the considerations of expediency that impelled Catholics to side with Protestants in opposition to the presumed interests of the papacy. If any criticism of this section is to be made, it is that the references to the broader historical background are too scanty. This deficiency is even more pronounced in the introductory part of the book, to say nothing of a few errors of historical fact that can be found in the first two chapters.

One is tempted also to criticize the allocation of space to the several

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events that mark the successive stages in the decline of papal influence. The material on the Peace of Westphalia covers about one hundred and fifty pages, whereas the Lateran Accord, which terminated the intransigent attitude of the popes and the period of futile protests, is given less than three pages.

In the section dealing with the secularization of political theory, one is surprised to find Hobbes referred to as a "disciple" of Machiavelli. Bodin is disposed of in a footnote, because "his doctrines are confused, incoherent, and inconsistent, and since he avoided any awkward considerations of papal influence in politics . . . " (p. 207).

In evaluating the gains and losses of the papacy owing to its withdrawal from power politics, the author differentiates between interference in "politics" and "social leadership." This distinction seems artificial in this day when international politics threatens to assume the character of a "war of ideologies," and when German Catholics, in spite of alleged violations of the concordat of 1933 by the political authorities, agree to support neo-pagan Nazis in their crusade against communism.

A profusion of references denotes a great deal of hard work. Omission of some of them, however, would have shown the author's sense of discrimination in a better light. Despite the shortcomings mentioned, the book is a genuine contribution to the literature of the subject. It is unique in so far as it surveys this important phase of the history of the papacy over a period of fifteen centuries.

HENRY JANZEN.

*Hamilton College.*

*L'Individu et l'État dans l'Évolution constitutionnelle de la Suisse.* By WILLIAM E. RAPPARD. (Zurich: Éditions Polygraphiques S.A. 1936. Pp. ix, 556.)

The author of this book is not only the rector of the University of Geneva and co-director of l'Institut Universitaire de Hautes Études Internationales; he is highly respected in Swiss political circles and known in the international field as a member of the Permanent Mandates Commission of the League of Nations. He makes a characteristically winning gesture when he declares in the preface of the present tome that "this, like every study of the social sciences, is only a slice of the historical reality seen through the prism of the author's *esprit.*" We are told "without false modesty" that the work has resulted from two very different invitations to the author, one that he write a manual on Swiss politics for the use of American university students, the other that he lead a series of conferences at Lucerne in the summer of 1935 on the subject of the individual and the state. He prepared himself for both undertakings by studying the relations between the individual and the state in the constitutional evolution of Switzerland.

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The subsidiary rather than the leading title is the better indication of the book's actual content. The work is essentially a constitutional history of Switzerland, very readable and amply documented. Primary sources have been used almost to the exclusion of earlier histories and monographs, and in the text are numerous long and short extracts from legal documents, committee reports, and political speeches.

There is presented throughout—although not, in the reviewer's opinion, with close dependence upon the array of factual material, and with only brief analytical interpretation—a view of the individual *en face* the state. The individual is no particular, no typical, person, but an abstraction in which are embodied those traits, rights, and tendencies that are common to all members of the community. Under the *ancien règime*, he is found to be essentially without rights, an instrument of the ruling classes. After collapse of the libertarian and idealistic constitution of 1798—the story of whose principal creator, the patrician Pierre Ochs, seems authentically as well as interestingly told—the individual attained, under the Napoleonic régime, to certain liberties, lost them again in the Restoration, and regained them through the events of 1830 and 1848. Freed after 1830 from the ancient constraints of the state, first in the cantons, then in the Confederation, the individual as master came soon to demand "more and more imperiously" the services of the state.

But the servant grown indispensable may end as a tyrant. "Perceptible in the cantons on the morrow after 1830 . . . after 1848 also in the Confederation," was the growth of state power. In the elaboration of the present constitution, that of 1784, is to be seen a marked ascendency of *étatisme*, the last of a three-fold historical sequence: individualism, democracy, *étatisme*. The last threatens already to destroy the other two, even in Switzerland. From having long been "an islet of free trade in the heart of a protectionist continent," is not Switzerland now "one of the warmest hearths of contemporary mercantilism?" More generally, the dangers from the state are the same here as in the other democratic states. The future hoped for is "not blind reaction, not communist revolution, not a fascist *coup d'état* . . . but a return to more of individual liberty and less of economic *étatisme*," the limitations of which may be seen in the everywhere mounting public debts. Admittedly there ought to be a "progress toward new forms of solidarity and social collaboration" (p. 537), in which the state will not be assigned more than it can do well. But the nature of whatever "new forms of solidarity" are envisaged is not indicated in the argument.

To anyone sufficiently set in the individualist doctrines of the older liberalism, and asking, therefore, no considerable inquiry into what the liberty of the individual may really mean, these fifteen chapters of history will not lack convincing quality. To all who have an interest in the political institutions of Switzerland, there is afforded an illuminating con-

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tribution, including, with the political, not a little of the economic, as well as of strictly legal, aspects.

WALTER SANDELIUS.

*University of Kansas.*

*Cabinet Government.* By W. IVOR JENNINGS. (Cambridge, Eng.: Cambridge University Press. 1936. Pp. xii, 484.)

*The King and the Imperial Crown; The Powers and Duties of His Majesty.* By A. BERRIEDALE KEITH. (London and New York: Longmans, Green and Company. 1936. Pp. xiv, 491.)

These two volumes are important additions to knowledge of the working of British political institutions. While dealing primarily with different organs of government, both necessarily deal with the relations of the king to the cabinet; while, as both cover a larger field than is indicated by their titles, there are other topics which are discussed in the two works. Most of Mr. Keith's volume deals with the powers and duties of the king in the affairs of the United Kingdom; and only in the last chapter does he take up imperial relations. Mr. Jennings, in addition to his detailed account of the cabinet, has two chapters on constitutional monarchy and the personal prerogatives of the king, and also several chapters on the administration.

Both writers deal almost entirely with the period since 1832; and both make extensive use of the *Letters of Queen Victoria* and biographical works on the leading statesmen, sovereigns, and others in contact with public affairs. Mr. Jennings refers to more works of this kind than does Mr. Keith, and also cites more frequently official documents such as Parliamentary debates and the reports of Parliamentary committees and some royal commissions.

Mr. Keith is often emphatic in expressing his opinions, especially his dislikes; and Gladstone is almost the only prominent statesman who escapes some censure. Mr. Jennings, in general, is more moderate in tone, but at times is more positive than Mr. Keith, and shows some bias towards the Labor party.

"The influence of the crown," says Mr. Jennings, "depends upon him who wears it. . . . The impress of Queen Victoria's personality is evident on every page of the political history of England during her long reign . . . King Edward's [VII] influence was much smaller. He rarely criticized or made suggestions, though a few cases are known. The influence of King George [V] must be largely a matter of surmise." Mr. Keith holds that: "The influence which the crown may . . . exercise in public affairs is unquestionably great; how far it extends depends largely on the personality and interests of the sovereign." He questions the view that the royal prerogative declined under Edward VII and George V, as compared with the time of Victoria.

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There are also differences of opinion on more specific questions. Mr. Keith holds that the choice of the king in asking Mr. Baldwin and not Lord Curzon to form a cabinet in 1922 "established the doctrine as a convention that the prime minister should under any but abnormal circumstances be in the House of Commons." Mr. Jennings states that this action "does not of itself imply that the king must never in future appoint a peer as prime minister."

During the present century, there has been discussion of the power of the king to dismiss a ministry, or to force or refuse a dissolution. Mr. Jennings holds that the power to dismiss or to force a dissolution has lapsed, and that the power to refuse a dissolution is maintained in theory, but can hardly be exercised in practice. Yet he states that the king "would be justified in refusing to assent to a policy which subverted the democratic basis of the constitution, by unnecessary or indefinite prolongations of the life of Parliament, by a gerrymandering of the constituencies in the interests of one party, or by fundamental modification of the electoral system to the same end.

Mr. Keith takes the position that: "The power to force a dissolution undoubtedly exists, but it means the dismissal of a ministry which will take office and bear the responsibility for the dismissal." But the mere possibility that this may create the impression that the king is capable of partisanship "rules out any action of this kind, leaving the final use of this power for the gravest occasions." As an instance, he states that "any Conservative attempt to restore the power of the Lords without putting the issue to the country would have to be resisted by the king." Mr. Jennings would probably accept this addition to his list of occasions; but there would be more question as to the duty of the king to accept proposals for a completely socialistic system from a Labor government.

Recent events add significance to Mr. Keith's suggestion that the threat of abdication might be used to compel ministers to appeal to the country. Such threats were made by Queen Victoria, and seem to have been thought of by Edward VII. He considers, however, that this would be a dangerous measure, not likely to be utilized. In the case of Edward VIII, the result was the acceptance of his abdication, and the writing of a new chapter in the relations of the king to the cabinet and Parliament.

Mr. Keith discusses more fully than Mr. Jennings the influence of the king in various fields, such as foreign affairs, defense issues, the established churches, and the grant of honors. Both of the authors call attention to the increasing importance of the private secretary to the king, and the part played by other "irresponsible advisers."

Mr. Jennings, as his title indicates, is concerned primarily with the working of the cabinet system, the position of the prime minister, collective responsibility, the use of cabinet committees, and the cabinet secretariat. Not the least important part of his work deals with the

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administrative machinery of the government. A brief general survey is supplemented by an appendix outlining the duties of the numerous departments and offices, and by chapters on "Ministers at Work," "Interdepartmental Relations," and "Treasury Control."

JOHN A. FAIRLIE.

*University of Illinois.*

*Samhällskrisen och Socialvetenskaperna.* By GUNNAR MYRDAL AND HERBERT TINGSTEN. (Stockholm: Kooperativa Förbundets Bokförlag. 1935. Pp. 68.)

*Unghöger: Politiska Essayer.* By GUNNAR HECKSCHER. (Stockholm: Bonniers. 1934. Pp. 187.)

*Pontus Fahlbeck och Samhället.* By ERIK ARRHÈN. (Stockholm: Ungsvenskarnas Skriftserie VI. 1935. Pp. 88.)

Among the scores of books relating to politics and administration which have been published privately in Sweden in the past two years, the works listed above are typical. The first is a reprint of the installation addresses delivered by Professors Myrdal and Tingsten. The second is the "battle cry" of the Young Conservatives; its author is a docent at Uppsala University, the son of the world-renowned Professor Eli Heckscher. The third is written by one of the more "regular" young Conservative leaders, and it presents the views of the moderates of the right wing.

Where is the vast body of Swedish liberal literature corresponding to our own output during this period? There is not any. This is true because, for one thing, nearly all Swedes are moderate, and there is therefore no need for polemical writing. Furthermore, no legislative novelties are ever introduced without a previous survey of the subject by experts, who are drawn from all parties and represent all shades of opinion.

The rôle of official reports in legislation merits a word of comment. When the problem of socialization came before the government of Sweden some years ago, several committees of experts were appointed, or individuals were commissioned, to prepare reports on all phases of the problem. Rickard Sandler, recently the minister of finance, was first asked to inquire into the whole problem, with special attention to theory and practice in other lands. Later, a committee, under the chairmanship of Torsten Nothin, governor-general of Stockholm, was instructed to survey the entire field of domestic resources and industrial peace. Simultaneously, other committees got under way with investigations of housing, population, and dozens of related subjects. Sandler's report, a penetrating and scholarly document, is now available, as is the Nothin report, which covers every phase of Swedish life.

By these and similar reports, the area of discussion is limited to interpretation of the facts—or to re-marshalling the facts and the theories so

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that they are made to serve special interests and peculiar prejudices. In a state which is well organized socially, intellectually, and economically, that is a very small area. Consequently, privately published works confine themselves to popularizing points of view which emerge in the official reports, with occasionally, to prove the rule, some twisting of the truth to serve selfish ends.

Professors Myrdal and Tingsten are known as Social Democrats. The former, particularly, has had great influence over the administration, and might be regarded as a radical. Heckscher and Arrhèn are Conservatives. To the uninitiated, it is amazing to note how often the views of all these men coincide. If one may do them the injustice of boiling down their contributions, one could say that Myrdal and Tingsten differ from their friends on the right, not in the measure of their devotion to democratic forms of government, but in their choice of problems to be attacked immediately. They, i.e., Myrdal and Tingsten, believe in turning all the intellectual forces in the realm to the promotion of stability and order on a higher level. They want the condition of the poor improved, they want the traditionally Swedish democratic instruments of government safeguarded and strengthened—because they have faith in the common man —and they expect to win universal adherence to their program because they believe that it is the only intelligent way to proceed.

My impression of the Conservative position in Sweden is that it hides its objectives behind a barrage of tactics. Heckscher is convinced that the youth must take command of the Conservative party and make it a constructive organ for the furtherance of the common good. Much of his writing is in that vein, and most refreshing it is in some respects, as when he attacks the Jewish problem. This is really not much of a problem in Sweden, and so the outside world will be more interested in Heckscher's social and financial program. As suggested above, this program is strongly liberal. It is based on the assumption that the Social Democrats move too quickly and incautiously toward the goal of complete industrial and political democracy, and that it is the function of the Conservative party to supply a salutary and sound retardation to its achievement. Arrhèn, by means of a commentary on the thought of Fahlbeck, one of Sweden's pioneer political scientists, articulates the prejudices of the patriotic young Swede. Fahlbeck subscribed to the view that class distinction was a fact. He resolutely and honestly argued for the domination of the bourgeoisie, which he identified with the intellectuals. Since the Swedish parliament was composed of four estates as late as 1860, Arrhèn has no difficulty in proving the validity of this doctrine—for Sweden. The Young Conservative objective is a class-differentiated but coöperating state. It is not fascist, for as Arrhèn asserts, that which is untrue in national socialism, i.e., "race-hate, intolerance, regimentation, etc.," has been convincingly discredited by the German and Italian examples.

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The essential "view of life" in Fahlbeck's writings is too comprehensive and intricate to be set down here. But Arrhèn's little volume deserves study because of the clear and forthright manner in which he lays bare the roots of Swedish young conservatism, so puzzling to those who think of conservatism in terms of other cultures, other *mores*. Swedish conservatism accepts proportional representation, equality before the law, a measure of government intervention, and even ultimate public planning and ownership, fundamentally because it feels that these principles are suitable for the Swedish nation with its special conditions of resource, tradition, and background.

Professor Myrdal cuts across this problem from another angle. In a lecture entitled "World Trends in National Economy," he analyzes the problem of method, with illuminating paragraphs on such methodological concepts as objectivity, *Weltanschauung*, and criterions of value. The most significant sections of the treatise are those which put planning, the gold standard, and such working social objectives in their proper place. Both Myrdal and Tingsten demand the retention of the democratic form of government, academic freedom, and freedom of discussion.

But what actually distinguishes the Right from the Left in Sweden? Not these conditions; for both sides vie with each other in maintaining them. The cleavage is rather to be found in presuppositions regarding the "world" or "life." As Myrdal insists, conservatives, and even liberals, are bound by their hypotheses regarding the relations between classes, the limits to the authority of the state, and the indestructibility and immutability of certain institutions, whereas the objective political scientists merely describe what exists, then recommend experimentation as a guide to further action. This is, in Sweden, the socialist view. Can it be that those scholars who are most active in furthering the socialist cause are at heart committed to the "världsåskådning" (world-view) and the values which inspire the socialist political leaders? I suspect that it can.

ROY V. PEEL.

*New York University.*

*Crime and Justice.* By SHELDON GLUECK. (Boston: Little, Brown and Company. 1936. Pp. 349.)

*Preventing Crime: A Symposium.* EDITED BY SHELDON AND ELEANOR GLUECK. (New York: McGraw-Hill and Company. 1936. Pp. 509.)

*Local Democracy and Crime Control.* By A. C. MILLSPAUGH. (Washington, D. C.: Brookings Institution. 1936. Pp. 263.)

*A System of Criminal Judicial Statistics for California.* By RONALD H. BEATTIE. (Berkeley: University of California Press. 1936. Pp. 238.)

"The more serious shortcomings in crime control are probably not to be found in organization, in law, or in procedure. The central problems

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no doubt have to do with personnel and with public attitudes." The reader will find support for this observation of Millspaugh in almost every chapter of the books under review. He will find serious contradictions between conditions as the public believes them to be and the actual conditions in criminal administration, between the Pullman car bromide and the diagnosis of the expert, between the patent medicine remedy suggested by the Sunday supplement and the prescription of the scientifically trained social physician.

This is particularly true of *Crime and Justice*, which is an unusually effective attempt to popularize present knowledge concerning crime control. Covering the whole problem of criminal control, from the public tolerance of petty racketeering to the punishment of the hardened offender, it not only reflects careful scholarship, but is clearly and interestingly written as well.

Most efforts to arouse the public to the need of reform follow the ancient homoletic principle that a conviction of sin is necessary to conversion. The formula of the muckraking decade, and of the state reorganization revival, is quite as useful in promoting a renaissance of criminal justice. Hence, we have the dirty courtrooms, the law's delays, judicial ignorance, incompetence of magistrates, the *via dolorosa* of youth on city streets all portrayed with sufficient detail, vividness, and statistical evidence to convince all but the most hardened. Nor is it a criticism of Dr. Glueck to point out that only passing attention is given the distinct improvements which have been made in various aspects of criminal justice during the past score of years. To emphasize them would only have detracted from the effectiveness of the final two chapters, in which he points to the sawdust trail of repentance. It is significant, however, that there seems to be a surprising dearth of scientific evidence to support the author's obviously sensible proposals for reform. Of course, Dr. Glueck cannot be blamed for this any more than any other social scientist. We tend to become so engrossed in the sins of society that we have neglected to study the steadfastness of our converts.

"After centuries of activity, Justice is blind to the very fundamentals of her work. In many places, she does not know how many crimes are reported to the police, she does not know how efficient are her various knights in terms of the numbers and proportions of cases they dispose of and the manner of the disposition . . . So Justice gropes blindly, an easy prey to her betrayers, to uninformed and equally blind reformers, to her own mistakes." This indictment of Glueck should present a challenge to social scientists.

The most hopeful efforts to improve the insight of Justice have relied on fuller and more accurate criminal and judicial statistics, but these are usually obtained by having a local official report the number of cases

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falling under prescribed classifications. Unfortunately, most court clerks have neither the statistical training, legal competence, nor social vision to insure complete and accurate reports. Some of the statistical data collected in this way are almost fantastic in their inaccuracy. For example, Beattie in his *Criminal Judicial Statistics in California* found that both the attorney-general and the judicial council collect data on such matters as the number of defendants prosecuted, the number charged with felonies, the number convicted, and the number sentenced. In the biennium which he studied, the number of cases reported by these two agencies do not agree in a single particular. In total, the attorney-general reported nearly 3,500 defendants who escaped the judicial council's notice.

In 1930, the Bureau of Public Administration of the University of California inaugurated a research project to test the feasibility of another method of compiling judicial statistics: "the reporting of certain details on each case handled by the court to a central agency, where the information can be tabulated and analyzed." Beattie's volume, which is a report on this project covering a single fiscal year (1931–32), should convince the most skeptical that the bureau's method is both sound and economically feasible. It gives ample evidence of most careful workmanship and contains a full description of the techniques used in reporting and analyzing the data.

Although the work is most important as a methodological contribution to the problem of opening the eyes of Justice, the summary of "the more important factors in the prosecution and trial of felony cases" is of considerable value. Even though the bureau lacked official support for the work and the statistics cover only a single year, there is rather striking evidence of a positive relationship between the chances of conviction and the speed with which a case is disposed of. The longer the trial, the less chance of punishment. It is also clear that the evils of political prosecution are considerably more apparent in two of the counties studied than in the third.

One of Glueck's proposed reforms is the establishment of a state department of justice in which the various technical services in the administration of the law should be consolidated. His discussion does not make it clear why such an integration of law enforcement should occur at the state, rather than at the county, level. The argument on this point has been supplied in an admirable way by Millspaugh in his *Local Democracy and Crime Control*. As its name implies, this is much more than a discussion of the specific work performed by the sheriff, court judge, or prosecuting attorney. It is rather a penetrating discussion of the value and functions of local government, with some reference to the crime problem.

Millspaugh finds that an efficient county should have between 20,000 and 25,000 population, living in an area of not more than 6,400 square

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miles. Tested by this yard-stick, only one-half of the counties in the United States are large enough in population to give efficient service. Consequently, their only justification must lie in some other local self-government value, such as friendliness of the government, the preservation of democracy, an opportunity for initiative, careful spending, and the development of a watchful citizenry. Dr. Millspaugh weighs these values one by one and finds each of them wanting. "When friendliness permeates government, it wastes time and money." "The preservation of democracy probably depends less on governmental structure than on the solution of fundamental economical problems and on the maintenance of the prestige and power of representative legislatures." "Local self-government provides, theoretically, an opportunity for initiative, but how rarely have counties seized the opportunity! Initiative appears to have come in most cases from the nation, the state, and the city." "The small self-governing unit tends to defeat its own ends. By encouraging debt, it breaks down the chance of financial responsibility on which stable popular government depends; and by wasting taxable resources, it saps the prestige of democracy." And finally, "atomization of government clouds the sources of public information."

The first alternative to the present arrangement of local government is some plan for regional readjustment, such as county consolidation, the use of functional districts, or the elimination of city-county overlapping. Except for the last method, the author finds that "regional readjustment does not seem to take us far towards solving the problems of local democracy." He is similarly pessimistic concerning the internal reorganization of the county, believing that manager-government is feasible only in less than one-half of the counties. There is little chance of efficient county organization as long as the county is too small to render really economical service. The third alternative lies in the transfer of many county functions to state agencies. This would not necessarily eliminate the county. There are numerous functions which may be best exercised under local control, such as the registering of property instruments, and there will always be some communities which desire services not wanted in others, such as sidewalks, museums, theaters. Furthermore, there are various functions, e.g., library service, which are in the early stages of development and for which favorable local opinion can be developed easier than support can be secured on a state-wide basis. But there are many services, and this applies with particular force to crime control, which only the state can handle efficiently.

Dr. Millspaugh is much too sagacious to insist that anyone is able to lay out a completely perfect system of state criminal organization. His last chapter is indeed a plea for research in this field and an outline of the forms which this research might well take. Students of government might

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profitably take to heart his suggestion that they study the immediate problem of applying their findings, as well as the ultimate goals to be reached.

The most promising attack on crime control would seem to be in preventing crime rather than in superior policing, more effective prosecution, or more accurate statistical reporting—important as they are. Acting on the theory that many criminals are made and not born, a number of private organizations and public agencies have engaged in programs designed to redirect into constructive channels the energies of young people who otherwise might fall afoul of the law. Twenty-four of these projects are reported in the symposium, *Preventing Crime.* They cover such varied approaches as educational work, the coördination of community social activities, police crime-prevention bureaus, citizenship colonies, and recreational agencies. Naturally, the efficiency of these activities depends to a very large extent upon the development of a trained and sympathetic personnel to carry them into effect; but with adequate public support such a personnel may be recruited. The fundamental difficulty is rather the attitude of the public. As long as we continue to regard crime in terms of personal responsibility, it will be difficult to embark on a broad social program of crime prevention. But if we can once convince society that it is really fostering crime by its muddling, we may, to use Millspaugh's phrase, "stop skidding to our destination and drive toward it under control."

RODNEY L. MOTT.

*Colgate University.*

*Federal Justice.* BY HOMER CUMMINGS AND CARL MCFARLAND. (New York: The Macmillan Company. 1937. Pp. ix, 576.)

The first Attorneys-General were part-time officers charged solely with the tasks of handling federal litigation before the Supreme Court and advising the President and heads of departments on legal matters. Until 1814, they were not even required to reside at the capital, and it was not until four years later that an office and clerk were furnished at government expense. Consequently it was not surprising that William Wirt, on assuming office in 1817, wrote President Monroe that he was unable to find "any trace of a pen indicating in the slightest manner any one act of my predecessors." Resolving to do better by his successors, he entered copies of all of his opinions and correspondence in his "opinion book" and "letter book," establishing a custom which set the general pattern of record-keeping followed until the reorganization of 1904. But when the Department of Justice was created in 1870 it did not take over the earlier records, which ultimately found their way, together with bundles of miscellaneous manuscripts and papers, into the storage rooms of the Library of Congress.

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The incumbent Attorney-General, acting through a staff of trained research men, undertook to analyze and classify all of this material, together with the more recent data in the files of the Department of Justice. Finding, he tells us, that "a picture of American history from a new point of view was unfolding" before his eyes, he was prompted to write the first rounded account of the history of his office and of the Department into which it has evolved. The resulting volume, written in a clear and simple style, is one of substantial value. Such matters as Taney's rôle in the struggle with the Second Bank of the United States; the sordid "legal" side of reconstruction; efforts to curtail private exploitation of natural resources; the activities of the Department of Justice during and immediately after the World War, and its rôle in labor cases, are adequately and dispassionately summarized. The gradual but apparently inevitable evolution of a national police force, and of centralized supervision over federal district attorneys, are traced. Copious references in the footnotes, and an adequate index, add to the book's usefulness. However, it contains little that is new. Even the publisher's promise of new light on "the hitherto undisclosed methods of selecting judges" simmers down to a repetition of facts already well known to political scientists interested in legal matters.

Although the volume was released just a month prior to President Roosevelt's message to Congress on reorganization of the federal judiciary, there appears to be no connection between the two occurrences. Otherwise, plans to force the retirement of aged judges would have been given greater emphasis, particularly that of Attorney-General (now Justice) McReynolds (p. 531).

J. A. C. GRANT.

*University of California at Los Angeles.*

*Brandeis: The Personal History of an American Ideal.* By ALFRED LIEF. (Harrisburg, Pa.: Stackpole Sons. 1936. Pp. 508.)

In this book, Mr. Lief is not concerned primarily with the twenty years in which Louis D. Brandeis has been a member of the Supreme Court. This period is not entirely neglected, but the student of Brandeis' place in the work of the Supreme Court will find much more comprehensive accounts in previous books and essays. Mr. Lief's selection of cases is reasonably complete, but he does little more than summarize or quote from Brandeis' opinions. And, doubtless to underline the non-legal character of this study, he carefully avoids giving the names of the cases with which he deals. Even the rather long quotations from the dissenting opinion in the New State Ice case are accompanied by no references to title, volume, or page, and this although the author evidently believes that this opinion is particularly representative of his subject's point of view.

On the other hand, the book tells us a great deal about Brandeis' life,

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and especially about the very large part of his life that has been devoted to attempts to bring a greater measure of justice into a world where there is all too little of it. His struggles for savings-bank insurance in Massachusetts, for conservation, against the "trusts," against the New Haven management; his support of Wilson in 1912; his adherence to the Zionist movement—all of these and several lesser campaigns are discussed in considerable detail. His legal career in Boston, together with the charges brought against him in 1916 by men whom he had antagonized during his long career as an attorney and a crusader, are described carefully.

Since the book is professedly a study of "an American ideal," it does not seem too much to expect to find a clear statement of that ideal. In the concluding chapter, there are some general observations on the character of Brandeis' philosophy, but no coherent attempt at analysis. We are told that "Brandeis was willing to be called a Jeffersonian." So is Mr. John W. Davis. The vagueness of this characterization is not dispelled by the statement on the following page to the effect that "Brandeis' political and economic vision was closer to anarchism." How does Mr. Lief reconcile this with Brandeis' advocacy of many forms of government regulation? He says that Brandeis "liked to think of the Scandinavian countries, where the socialist governments were not socialist in action—they did not have to be; independent groups worked out the answers." But the coöperatives in Scandinavia are accompanied by a great deal of government ownership and regulation. I do not mean to suggest that Brandeis' thought is self-contradictory, but I do wish that Mr. Lief had set forth more clearly his own interpretation of Brandeis' philosophy. And I also regret that there is no critical estimate of Brandeis' ideas and work. We may agree that Brandeis is a man of extraordinary ability, even a great man. But it does not follow that he has a firm grasp on the whole of economic truth. It is as yet too soon to be certain about the importance of the system of savings-bank insurance, or the factual brief, but what evidence is there that they have had, or are likely to have, any considerable influence? Does the doctrine of littleness betoken great social insight, or is it a nostalgic dream, unrealizable under modern conditions? It is disappointing to find no questions of this kind raised.

BENJAMIN F. WRIGHT, JR.

*Harvard University.*

*Le Droit Chinois.* By JEAN ESCARRA. (Pékin: Henri Vetch. 1936. Pp. xii, 559.)

The author is probably the best qualified Westerner to write on the general subject of Chinese law, both ancient and modern. He has long been a professor of law in France, and for the past fifteen years he has been associated, directly or indirectly, with the codification commissions of China. He has always held out for an adaptation of Western law to the

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needs and prevailing customs of Chinese society and deplores the hasty legislation of recent decades which has consisted largely in translating and synthesizing Western codes. This the modern codifiers have in fact been led to do in an effort to meet the conditions laid down by Western nations enjoying extraterritorial privileges which must be fulfilled before these nations will restore to China its sovereign control over their nationals resident there. But he sees now the beginning of a new period of study of the old law and of current conditions in Chinese society, upon which lawmakers and judges must in the future come more and more to rely.

The author's interest in the history of the law of the *ancien régime* dates back to his early years in China. In this work he has given the best summary treatment of philosophical conceptions underlying that law, as well as its historical development, that exists in any Western language. This, together with his select bibliography (over seven hundred items, a large percentage of which were published after 1903 when the period of modern codification began) serves as an excellent introduction to the study of Chinese law. The book likewise gives the fullest historical account of the period of codification under the influence of Western law and the attendant problems connected with the attempted applications of these over-Westernized codes in the modern courts.

It is a unique book, the reading of which will carry the reader to the very heart and core of the old society as well as give him a fuller grasp of the problems confronting the leaders today in their efforts to modernize this ancient society and introduce into an Oriental culture Western principles of jurisprudence. The author discusses the developments of the codes under the *ancien régime;* the influence upon Chinese law of the Confucianists who advocated the rule of society by men under the influence of a natural moral order; of the legists who believed in the government of men by laws rather than principles; and he makes some comments on the influence of Buddhism on the law, notably its effect in humanizing the law and punishment, and maintaining the principle of equality before the law.

For centuries, fully a third of the human race has lived and attained a high degree of cultural development under the rule of Chinese law—a rule which expanded beyond the boundaries of China to Japan and to Annam. In the study of that law, there lies a rich mine of unexploited social experience. The fields of historical and comparative jurisprudence will be circumscribed and incomplete as long as Chinese law remains beyond their purview. Professor Escarra, in this book, has made a general survey of the field and has sunk down a shaft or two in order to assay the rich ore which lies beneath. Lawyers and students of historical jurisprudence and comparative law will discover this record of his findings to be enrichingly suggestive and thought-provoking.

CYRUS H. PEAKE.

*Columbia University.*

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*Hamilton Fish; The Inner History of the Grant Administration.* By Allan Nevins. (New York: Dodd, Mead and Company. 1936. Pp. xvii, 932.)

Not only is this weighty volume an excellent biography of Hamilton Fish but, as the sub-title indicates, it presents a most illuminating account of the administration of President Grant. The term "inner history" is well chosen. Fish was a member of the Grant cabinet throughout the administration and kept a detailed record of the daily happenings in Washington. This record, as Professor Nevins explains in his note on manuscript sources, includes a diary of perhaps 1,000,000 words, for the years 1869 to 1877; forty-eight letterbooks for 1839 to 1893; a great mass of letters received; nine pocket memorandum books for 1883 to 1891; copies of manuscript instructions to our envoys abroad; copies of Fish's correspondence with foreign legations in Washington; and much other invaluable material. These papers have been used very extensively by Professor Nevins. They are emphasized here, for it is seldom that so rich a mine of new information is opened to a biographer. Professor Nevins has made the most of his opportunity. Fish was not a brilliant Secretary of State, but he took a firm stand for honor and honesty in a period when those ideals seemed almost to have disappeared from public life.

At first glance, the book would seem to be strangely constructed. Only about one hundred pages are devoted to the first sixty years of Fish's life and thirty pages to the last twenty years, leaving the bulk of nearly eight hundred pages to the short period of eight years; but it was in these eight years that Fish performed his great service to the nation.

It is difficult in a brief space to do justice to this biography. A descendant of several of New York's most prominent families, Hamilton Fish was trained for the law. A term in Congress passed uneventfully for him. This was followed soon after by two years as governor of New York. Only the untimely death of President Taylor prevented Fish's nomination to the position of Secretary of the Treasury in the Taylor Administration. In 1851, he returned to Washington as senator, but again attracted little public attention. However, as a member of the Senate Committee on Foreign Relations for two years, Fish learned much that was to prove of value to him later. A visit to Cuba and an extensive journey in Europe also added to his information on international affairs. He aided with pen and money in Grant's campaign for the presidency, but gave little thought to further personal participation in political life. It was a distinct surprise to him, therefore, when Grant offered him the post of Secretary of State, which he reluctantly accepted.

Fish's official career has been divided into three parts by Professor Nevins (p. 638): "One year in which he [Fish] wrested full control of the State Department from Grant; four years in which he used that control to preserve peace with Great Britain and Spain, and to accomplish other

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important tasks; and three years in which he reached out for a larger measure of authority in an Administration that was increasingly disgraced and demoralized." Threatening to resign on several occasions, and actually presenting his resignation to President Grant more than once, Fish finally decided to remain to the end to salvage what he could from the unscrupulous men who so closely surrounded the President. The story proves that Fish had a wide measure of success.

In foreign affairs, Fish was faced with many troublesome problems, ranging from the Dominican affair and the bloody strife in Cuba to the settlement of the Alabama claims and other disputes with Great Britain. The misdeeds and peculations of ministers, American and foreign, disturbed him greatly. On all of these events his letters and diary throw much new light. Through it all he sought peace. It was his firm belief that everything possible should be done to avoid the terrible evil of war.

Professor Nevins is generous in his praise of Fish, but he does not fail to criticise him where he thinks criticism is due. So, too, while condemning Grant for his weak and vacillating ways, Professor Nevins gives him his just due for his refusal to use troops unnecessarily to assure Republican success in the Southern states in the Hayes-Tilden election.

The book contains an introductory note by John Bassett Moore, who had hoped to write the life of Fish. There is a critical note on manuscript sources (already referred to), but no detailed bibliography. The book is indispensable to all students of American history and government.

EVERETT S. BROWN.

*University of Michigan.*

*Zoning; The Laws, Administration, and Court Decisions During the First Twenty Years.* BY EDWARD M. BASSETT. (New York: The Russell Sage Foundation. 1936. Pp. 275.)

The history of zoning in the United States goes back some twenty years. Prior to that time, in 1913, a study was made in New York of regulations to limit the height and size of buildings. This was followed by a report on the possibilities of regulating, under the police power, the height, area, and use of buildings. The author of this book served on both of the commissions making these studies. With the adoption of the first comprehensive zoning ordinance, that of New York City in 1916, Edward M. Bassett was appointed counsel to the Zoning Committee of New York. He has served in that capacity since. In addition, he has served as counsel for numerous other cities throughout the country. The book embodies all of Mr. Bassett's experience during this twenty-year period.

The volume properly starts with a discussion of the relation of zoning to state constitutions. This is followed by a chapter on state enabling acts for zoning. Then there is a detailed discussion of the adoption and amend-

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ment of zoning ordinances, with a description of the various types of zoning districts.

Non-conforming uses have always been a troublesome problem in the drafting of zoning ordinances. There appears to be adequate authority for the elimination of so-called non-conforming uses, but conservative zoners have recommended that non-conforming uses be allowed to remain except in cases of total destruction by fire or otherwise. The so-called liberal group of zoners has been suggesting that steps be taken to eliminate all non-conforming uses over a period of years. Both views are discussed by Mr. Bassett.

The board of appeals has been called the "safety valve" of the zoning ordinance. It is discussed at length in Chapter VI. Chapter XI, dealing with "Particular Buildings and Uses," will be of benefit to the layman. The average person approaching a zoning problem thinks of it in terms of a boarding house, a hotel, a hospital, a garage, a gasoline station, a restaurant, a cemetery, etc., etc. This attitude has prevailed even in some courts which have given lip service to zoning in saying that they believe it to be legal, only to follow such a statement with a decision that in this particular instance of the junk-yard, store, or hospital, the zoning is unreasonable. As a matter of fact, some courts have used this form of argument to substitute their judgment for that of the legislative body.

The Bassett attitude has been one of conservatism and slow progress in the steady building up of the zoning law. There are others who feel that the courts are ready to uphold more advanced zoning which is plainly in the public interest. Mr. Bassett says: "In the outlying boroughs of New York City, landowners in residential developments have urged residential zoning of nearby localities bordering on railroads because such zoning would tend to protect their own homes. This was quite regardless of the fact that the land near the railroad should be preserved for future industries." Obviously, property which, according to a rational land-use program, will be needed for industrial purposes should not be zoned for residential purposes. On the other hand, it should not be assumed, and is not assumed by liberal zoning practitioners, that all property abutting upon a railroad is necessarily industrial. Many railroads run through residential areas where there is no logical reason for industrial zoning, and where the abutting land might properly be zoned for residential purposes.

This is unquestionably the best book on zoning which has appeared since Frank Williams published *The Law of City Planning and Zoning* in 1922. There is a bibliography and an index of cases.

WALTER H. BLUCHER.

*American Society of Planning Officials.*

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*War Our Heritage.* By Joseph P. Lash and James A. Wechsler. (New York: International Publishers. 1936. Pp. 159.)

*"We or They"—Two Worlds in Conflict.* By Hamilton Fish Armstrong. (New York: The Macmillan Company. 1936. Pp. viii, 106.)

The dilemma of pacifism has never been more acute and insoluble than in the present era of impending war. In the bellicose dictatorships, pacifism is suppressed. In the democracies, pacifists become allies of war-makers abroad in proportion as they hamper military preparedness and weaken the ability of democratic states to resist and restrain military aggression. This dilemma has repeatedly confused and rendered sterile the peace movement—in the United States no less than in Britain and France.

The cry for peace among American undergraduates is ably and sympathetically described in the stimulating volume by Lash (executive secretary of the American Student Union) and Wechsler (editor of *The Student Advocate*, author of *Revolt on the Campus* and former editor of *The Columbia Spectator*). Bruce Bliven, in his introduction, rejects the gospel of non-resistance, but hails the peace movement on the campuses as the hope of the future. The authors review the struggle against the R.O.T.C., the Oxford Oath movement, anti-war strikes, the "Veterans of Future Wars," and other phases of the fight against militarism by student liberals and radicals. Their work should be required reading for all college presidents, trustees, deans, and professors! The initial chapter, "M-Day," is a brilliant piece of imaginative satire describing the impact of the next war on American academic life. The closing chapter, "Please Omit Flowers," is more realistic than most peace literature. It contends cogently that militarism in America must be resisted because it may lead to fascism. But it does not quite face the paradox presented by a world in which the democracies are helpless before the dictatorships unless they arm and militarize themselves to a comparable degree.

This paradox flows from the fact that a house divided against itself cannot stand. The irreconcilability of the liberal and totalitarian ideologies is the theme of the scintillating pamphlet from the pen of the gifted editor of *Foreign Affairs*. Mr. Armstrong holds that there can be no peace, no understanding even, between disciples of liberty and the apostles of tyranny, whether in Rome, Berlin, or Moscow. He documents his argument with facts, quotations, and masterly analysis. He takes his text from the dictators. Thus Mussolini: "The struggle between two worlds can admit of no compromise . . . Either we or they! Either their ideas or ours! Either our state or theirs!" And thus Lenin: "An obituary will be sung either over the death of world capitalism or the death of the Soviet Republic." Here freedom lives. There it is dead. The "Gulf Between" cannot be bridged.

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In ringing prose, Mr. Armstrong summons the defenders of democracy to meet the challenge of totalitarianism, both nationally and internationally, and to remember that eternal vigilance is the price of liberty. The present reviewer sees no escape from these conclusions. Pacifism has become an irrelevance. Only a democracy in arms can defend itself from those who have unsheathed the sword against it. If this involves the danger that democracy may be destroyed by its own militarists, or that civilization may be wrecked in the clash of the embattled crusaders, these risks too must be faced. For there is now no alternative.

FREDERICK L. SCHUMAN.

*Williams College.*

*And Fear Came.* By JOHN T. WHITAKER. (New York: The Macmillan Company. 1936. Pp. 273.)

*Neutrality and Collective Security.* By SIR ALFRED ZIMMERN, WILLIAM E. DODD, CHARLES WARREN, AND EDWIN D. DICKINSON. (Chicago: University of Chicago Press. 1936. Pp. xviii, 277.)

Blackstone's dictum that humans are motivated by their wants and fears is given illustration on the international plane from several angles in these two books. Mr. Whitaker, after acquiring a sympathetic interest in the League of Nations at the University of the South, went to Europe for the New York *Herald-Tribune*, and was stationed as correspondent at Geneva, Berlin, Vienna, Rome, and in Ethiopia. In Africa, his young Italian driver asked him why wars occurred, and the book is a lively review of the history he has seen from the backstage, in answer to Francesco's question. The attractively personal narrative of his well-balanced and keen observations presents a spot picture of international political events from 1931 to 1936 much worth reading. It is a good book full of journalistic, but yet intelligent, overtones.

The lectures of 1936 on the Harris Foundation are published in *Neutrality and Collective Security*, two thirds of which is devoted to collective security. The three lectures by Sir Alfred Zimmern on "The Problem of Collective Security," by an easy and rather leisurely philosophical route, set forth that unity of popular will did not exist to support the conditions of law and order which the League of Nations was intended to provide; that out of past economic anarchy has come a dominant group of states which make social progress their goal; and that these "welfare states" are gradually weaving together a social integration which will insure the collaboration requisite for "the safety of all by all." Mr. Warren's cogent paper on "Congress and Neutrality" continues his constructive dissection of this alibi or excuse for not facing the necessity of coöperation to prevent the happening of war. Here he analyzes the merits and defects of the neutrality legislation of 1935 and 1936. Dean Dickinson, in his well-

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informed review of "The United States and Collective Security," concludes that consultation and coöperation founded upon general covenants of non-aggression may be envisaged as a universal approach to the desired security, with sanctions left to those who are willing to use them. As editor, Quincy Wright appends to the papers the salient documents, so that the volume can be both read and studied.

DENYS P. MYERS.

*World Peace Foundation.*

*Propaganda and Dictatorship.* EDITED BY HARWOOD L. CHILDS. (Princeton: Princeton University Press. 1936. Pp. vi, 153.)

As a direct outgrowth of round-table discussions during the annual meeting of the American Political Science Association at Chicago in December, 1934, the papers making up the present volume will be of particular interest to its members. Moreover, as Professor Childs points out in his introduction, they deal with two topics which have attracted a great and constantly increasing amount of attention. Undoubtedly "the world is both propaganda-conscious and dictator-conscious." Hence *Propaganda and Dictatorship* should appeal to wide circles of the general public as well as to the specialist.

Of the papers making up this volume, the first four discuss the facts of propaganda as presented in several contemporary dictatorships, while the remaining two are devoted to the theory underlying political propaganda in general. In the first series, Professor Fritz Morstein Marx deals with Germany, Professor Arnold J. Zurcher with Italy, Professor Bertram W. Maxwell with Soviet Russia; and since propaganda in the Danubian dictatorships is but a pale copy of Russian, Italian, and German models, Professor Oscar Jászi devotes himself more particularly to the ideologic foundations of the Austrian, Hungarian, Yugoslav, and Rumanian dictatorships. As a whole, these papers deal briefly and clearly with the agencies, methods, aims, and results of political propaganda in the countries named. Particular attention is given to press, radio, and cinema; but schools, youth organizations, labor organizations, and the characteristic one-party systems are also duly considered. The writers display admirable restraint: successes as well as failures of dictatorial propaganda are recorded. In general, however, the reader is impressed with its deleterious effects as indicated by Professor Zurcher, particularly with reference to Italy, in the following words: "the prostitution of education, the warping and suppression of truth, the instillation of false and dangerous doctrines, and the evocation and aggravation of emotions which lead to social violence."

The fifth paper, by Professor Harold D. Lasswell, is entitled "The Scope of Research on Propaganda and Dictatorship." It develops rather

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ambitious plans for investigation, suggesting, among other things, methods for determining the volume of propaganda, e.g., by the collection of exact data on "the per capita distribution of propagandists, the proportion of the national income devoted to propaganda, and the hours per capita of exposure to propaganda." In addition, Professor Lasswell presents some extremely interesting considerations regarding the effect of propaganda on world political development to date.

Professor George E. G. Catlin closes the volume with a paper on "Propaganda as a Function of Democratic Government" which is noteworthy for its mastery of the philosophic background. Nevertheless, it deals trenchantly with a question of the most practical character, namely, how democracies should meet propaganda designed for their overthrow. Briefly stated, his answer is that while democratic government "is completely precluded by its own principles from all use of propaganda, it is . . . free and under an obligation to encourage voluntary agencies, and particularly party agencies, to put forward the views upon which its own authority rests." In addition to the formulation of this general principle, Professor Catlin deals with various of its practical applications. For us of the United States, the question is as yet academic; indeed, as a result of the thoroughgoing repudiation of demagogues in the election of November, 1936, it may seem scarcely worth further discussion at this time. Other democracies, however, have had to face not only subversive propaganda but civil war as well. Our turn may come, and since forewarned is forearmed, one may at least hope for future round tables of the American Political Science Association to thresh out the question in all its details, including the drafting of possible legislation against armed and uniformed political organizations.

ROBERT C. BROOKS.

*Swarthmore College.*

*The Discussion of Human Affairs; An Inquiry into the Nature of the Statements, Assertions, Allegations, Claims, Heats, Tempers, Distempers, Dogmas, and Contentions which Appear when Human Affairs are Discussed and into the Possibility of Putting Some Rhyme and Reason into Processes of Discussion.* BY CHARLES A. BEARD. (New York: The Macmillan Company. 1936. Pp. 124.)

If the purpose of a subtitle is to help cataloguers, the foregoing leaves little to be desired. But the distinguished author of this little book uncovers nothing that is new or startling when he informs us in the opening sentence that the discussion of human affairs is going on all over the world. Nor will he provoke much dissent from his proposition that the causes, nature, and consequences of this world-wide discussion are worth looking into. One does not look into the subject very far, however, before

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finding that much of this discussion of human affairs is founded on "habitual assumptions," that is, on ideas which people take for granted whether they are warranted in so doing or not.

It must be so, the author argues. Notwithstanding the assurance of the candidly scientific that they are concerned only to discover the naked facts, and to use them with complete objectivity, it is Professor Beard's conviction that an effort "to discuss human affairs on the assumption that no assumptions are to be made" must inevitably prove futile. The claim of Pareto, "We have no preconceptions," is questioned by the author as a statement of fact. It is an assumption, and one that is not borne out by a treatise on general sociology in which both text and footnotes are "crowded with the kind of disdainful, bitter, and derisive remarks never found in any work on natural science by a writer of acknowledged competence" (p. 36). "How he or anyone else could reach the age of maturity . . . without arriving at any habitual assumptions must remain one of the seven wonders of the world" (p. 34). So much for Pareto!

One of the author's major postulates is that since "all human affairs are enclosed in history," and since recorded history has always been a hopeless mixture of fact and opinion, it becomes essential to the rational discussion of human affairs that we shall have knowledge of the various points of view from which expressions of opinion proceed. If those who discuss human relations appreciated the need not only of gathering facts but of understanding the process of interpretation, we would have less intolerance and some of the edge would be taken off bigotry. There would also be a moratorium on speeches in Congress.

The book is written in the author's usual epigrammatic and sprightly style, but it is not likely to have much lure for the general reader. It is rather for the historiographers to scan and be pleased or provoked as the case may be. Theories concerning the proper interpretation of history (all the way down from Ranke to Barnes) are punctured like so many toy balloons. "No theory," writes Dr. Beard, "can embrace the totality of history." One reviewer calls the book a disinfectant to be dusted on writers or syndicated newspaper articles and on platform orators. But to hope for its efficacy in that direction is asking much. Probably it will be most generally and most approvingly read by those who need it least.

WILLIAM B. MUNRO.

*California Institute of Technology.*

*Are American Teachers Free?* By HOWARD K. BEALE. (New York: Charles Scribner's Sons. 1936. Pp. xxiv, 856.)

*Curriculum-Making in the Social Studies.* By LEON C. MARSHALL AND RACHEL MARSHALL GOETZ. (New York: Charles Scribner's Sons. 1936. Pp. xvii, 252.)

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The first of these volumes is Part XII, and the second Part XIII, of the Report of the Commission on the Social Studies which was set up by the American Historical Association a number of years ago.

It is not necessary to read every one of the 778 pages preceding the appendix in Dr. Beale's book to learn whether American teachers are free. The eighth page is enough. There the reader is informed that "because no agreement can be reached on desirable limits for freedom, the ideal of complete freedom will be used as a standard or test of particular situations as they arise." The author evidently sets "individual" over against "social," like the old state of nature theorists, and assumes that social sanctions inevitably mean coercion, limitations on individual freedom. Persons who are aware of the tough strands in the social web will not be surprised that, in many communities, teachers are not free to advocate, or even to discuss sympathetically, pacifism or communism; or to question the validity of historical myths; or to suggest that man may have evolved from some other form of animal life; or to choose textbooks; or to decide on teaching methods; or to use tobacco and alcoholic beverages; or to associate with pupils of the opposite sex; or to disregard countless taboos. That the author has found so many instances of teachers' imprudent conduct may be news to those who are not acquainted with a few score of the profession nor with the ideal of meticulous historical research. Whatever may have been their preparation for teaching, most of the persons investigated seem to have thought that they were employed to teach in a vacuum, that there was complete insulation between the school and "the world outside," a favorite phrase among pedagogues.

The author might have made a greater contribution had he centered his efforts upon methods whereby teachers may, without endangering their positions, or provoking bitter conflicts, become aware of the tensions in their respective communities. Certainly teachers who are susceptible to persecution complexes should not be "free" to read this compilation of "restraints on complete freedom."

The second volume is the antithesis to the first in its treatment of social phenomena. The title inadequately indicates the broad scope of the work which the authors have undertaken. In effect, they propose to make the entire curriculum a study of social processes. They contend that "all studies are essentially social. . . . Realization that human experiences and knowledges are in essence cultural; that the fundamental purpose of the school is the selection and transmission of culture; and that cultural living may be summarized under a few great basic processes, should dominate all instruction." Their "frankly opportunistic" classification reveals six basic processes, "basic to all groups, past or present, large or small." These processes comprise "culture," which is "synony-

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mous with all that is peculiarly human in the way man lives." Since culture "has its roots deep in the biologic capacities of man," and since "cultural human living is also conditioned by the external physical world," the authors would utilize materials in these as well as in the more narrowly conceived social sciences for their "social process approach" to curriculum-making.

Emphasis is upon "a point of view and a methodology which, with a minimum of disruption and revolutionary change" in present-day material and school organization, will facilitate intelligent "selection and transmission of culture." In discussing one phase, they admit that "most teachers are not now trained to take such a comprehensive view, nor is the organization of available materials very helpful." However, "the task is largely one of organization; most of the materials are at hand. . . . The social process approach provides a social theory; this in turn furnishes criteria against which to measure alternative schemes of organization."

The merits claimed for the "social process approach" and the illustrative material, encyclopedic in scope, "marshalled" in support of the thesis should be examined by everyone interested in education. Social scientists, in particular, contemplating the results of their instruction, will be disposed to investigate the possibilities of the process approach.

HOWARD WHITE.

*Miami University.*

*Psycho-Analysis and Social Psychology.* By WILLIAM MCDOUGALL. (London: Methuen and Company. 1936. Pp. viii, 207.)

In these days when the need for a solid psychological foundation in the social sciences is increasingly felt by all those who are profoundly dissatisfied with a purely eclectic approach to the problems of human nature and conduct, and when the Freudian interpretation has made such an impetuous and often immature inroad into the explanation of political developments, this volume of the distinguished founder of social psychology will be welcome to all who dislike dogmatic slogans and hasty generalizations.

The work of Professor McDougall contains his lectures delivered at the University of London on the teaching of Professor Freud and his school, with the addition of four essays on the same subject previously published in various magazines. The author does not speak as the leader of an antagonistic school hostile to Freudism. On the contrary, he has a very deep appreciation of the Viennese scholar who, according to him, "has . . . done more for the advancement of our understanding of human nature than any other man since Aristotle." Yet his criticism is very outspoken, and sometimes sharp and ironical. He shows clearly, and for

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the most part conclusively, the main faults of the Freudian system: the lack of precision in its definition; its tendency to false generalization and extreme simplification; its disregard for antagonistic facts; the frequently careless manipulation of the tenets of its catechism such as Super-ego, Ego, Id, Libido, Oepidus Complex (which was fitly called the "ark of the Freudian covenant"), and that "most bizarre monster of all his gallery of monsters . . . the Death Instinct;" its haughty disregard of important movements and currents which cannot be explained by the sacred formulae.

But, whereas these dangerous tendencies are more than compensated in the work of the master by the intuitive force of a real genius, they often assume in the works of his innumerable disciples intolerable dogmatism, a brutal disregard for common sense, and an intolerant attachment to creeds which the master himself revised or qualified. Professor McDougall demonstrates convincingly how these qualities undermine the scientific spirit by the undue over-emphasis of sex and hurt social coöperation by the uncritical rejection of all types of repression.

The reviewer does not know of any other book which in so short a space has amassed all the essential facts and theories of the Freudian school. At the same time, it strongly emphasizes those aspects of the system which will add mightily to the elaboration of a system of social psychology to which the author has made such a remarkable contribution through his own researches, so full of acute observation and deep philosophic insight.

OSCAR JÁSZI.

*Oberlin College.*

## BRIEFER NOTICES

### AMERICAN NATIONAL GOVERNMENT AND CONSTITUTIONAL LAW

Professor Felix Frankfurter's *The Commerce Clause* (University of North Carolina Press, pp. 114) analyzes the function of the Supreme Court under Marshall, Taney, and Waite in directing the stream of constitutional history through the commerce clause. Because the application of this clause illustrates the peculiar problems of a federal system, around it is built much of our constitutional development. Marshall's rôle is outstanding because he created a conception of a "dormant" commerce clause to liberate trade from restrictive state legislation, even where Congress had not acted. In addition, Marshall was a statesman, and he realized that the court's function in statecraft depended on an essential pragmatism. Later, others less competent made his "purposed ambiguity" the basis for sterile dogmatism. Second only to Marshall was Taney. His statesmanship manifested a consciousness of the inability of the Court to discharge adequately the discretionary, political

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functions undertaken by Marshall. Through stricter construction, Taney sought to limit the scope of judicial discretion, and deference to the legislature became the device for counteracting Marshall's nationalism. Waite, the lawyer, made of Taney's policy a legal rule, limiting the Court even further. "Where the Constitution was not an explicit bar, the Court should leave the resolution of economic and political conflicts to the Congress." But Waite's lack of art in giving expression to his opinions made them a source for the mechanical formulas by which later courts have confined legislative powers. In these essays is no wistful retrospection, no effort to create a picture of the "true" Constitution, drawn from history. Because, however, the ideas of Marshall, Taney, and Waite color judicial thinking today, some light thrown on their aims and purposes will indicate the extent to which "the pressures of the past" should find expression in constitutional law today.—E. S. WENGERT.

Widely held popular opinions are refuted by Julius W. Pratt's *Expansionists of 1898* (Johns Hopkins Press, pp. 393), a scholarly and well documented study of the expansionist movement at the turn of the century. Instead of being a surge of enthusiasm rising from the Cuban crisis, "imperialism" was a reflection of a world-wide development which had earlier manifested itself in the partition of Africa and in the writings of American and British publicists. The Harrison Administration had felt the impulse of the new "Manifest Destiny," with Blaine playing the leading rôle. There followed the halting, inconsistent programs concerning Hawaii of which the author presents the first adequate account. To this, half of the volume is devoted, showing the expansionist policies deeply rooted before the Cuban crisis. The latter half of the book upsets opinions widely held as to the supporters of the forward movement. The Mahan school, including Roosevelt and Lodge, were its ardent advocates from the beginning; but business men, exporters, Wall Street interests, the financial press, and investors in Cuba were opposed. The newspapers were divided in opinion. The author finds no basis for the popular belief that the Hearst-Pulitzer rivalry brought on the war. Still, the strong minority which knew what it wanted succeeded in pushing the country into the conflict. When it came, almost all of the groups in opposition adjusted their arguments and prepared to make the most of altered prospects. Newspapers and the technical and financial press generally welcomed the new opportunities. Business favored forward programs. Organized religion, which had been peculiarly unvocal as the crisis approached, became enthusiastically expansionist. Churchmen will find the author's analysis of religious opinion of peculiar interest. The closing chapters analyze the hesitant progress of the Administration, pushed forward by the rising tide of public opinion in favor of making the most out of the war.—CHESTER LLOYD JONES.

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In *Prisons and Beyond* (Macmillan Co., pp. 334), Sanford Bates, United States director of prisons, tells in very interesting fashion of the work of the nineteen institutions of correction which the national government has established since 1900. Convicts are sent to the prison that is best adapted to their rehabilitation; their individual problems are considered by a classification committee composed of the warden, deputy warden, director of social service, medical officer, psychiatrist, psychologist, educational supervisor, chaplain, superintendent of industries, chief of mechanical service, and parole officer. The value of careful parole supervision, as opposed to the popular view fostered by the newspapers, is stressed. Mr. Bates looks beyond the prison to discuss some alternatives to incarceration that might prove effective and reminds communities which tolerate the causes of crime that they must answer its challenge. The author speaks with authority, for he has been at work in this field for twenty years, beginning as Massachusetts commissioner of correction. College students in search of a career may find their interests aroused by this book, since prison work is offering a new profession.—JAMES HARGAN.

Writing for the layman rather than for the expert, in *Democracy and the Supreme Court* (University of Oklahoma Press, pp. 143), Robert K. Carr raises the question as to whether judicial review, exemplified by analyses of six outstanding New Deal decisions, is retarding the progressive evolution of American democratic government. He illustrates forcibly how judges may and do construe constitutional provisions just about as they please, and he emphasizes that a majority of the Court may arbitrarily nullify a statute which, to a minority of its members, and to the President and Congress, may seem perfectly constitutional. The "average citizen" is challenged with the proposition that our democracy would not crumble in ruins if the Court should lose its power to declare an act of Congress void. If the citizen responds to this challenge with even so much as an aroused suspicion that perhaps the members of the Court are neither oracles nor magicians, but only "nine very *human* beings," then this book is a valuable addition to the current literature of political science.—ALDEN L. POWELL.

In his *Fundamental Issues in the United States* (Oxford University Press, pp. 74), E. A. Radice presents a concise British analysis of the New Deal. The underlying principle is seen as security rather than freedom of enterprise—a natural reorientation because "the period of American expansion seems to be over." The American system is expected again to prove adaptable if the "rising and expanding elements" maintain control. Rather unimpressed by admitted constitutional obstacles, the author optimistically regards congressional powers of taxation and finance as adequate to the occasion. A chapter on administrative problems deals

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ably with the spoils system and other aspects of party politics. Concerned over the budgetary problem, Mr. Radice advocates heavier federal income taxation of the moderately prosperous. Although this brief study occasionally suffers from the inexactitude necessitated by broad generalization, its conclusions are sound; and the detached viewpoint increases its value for American readers.—CARLTON C. RODEE.

*The Civil Service in Modern Government* (National Civil Service Reform League, pp. 58) has as its purpose "to describe the merit system in its theory and practice with enough brevity to make it available to a large number of readers." The purpose is accomplished admirably. The development and present status of merit in federal, state, and city civil services are stated briefly in the first part, consisting of twenty-six pages. The remaining thirty-two pages consist of an appendix, with eighteen very significant items. Among these are: "A Comprehensive Personnel Program"; "Outline of English Civil Service System"; "The Growth of the Federal Civil Service" (graph); "Classified and Unclassified Positions in the Federal Civil Service;" and "A Selected Bibliography." The pamphlet is primarily informational rather than critical or argumentative.—P. S. SIKES.

The fifth edition of Professor Robert E. Cushman's *Leading Constitutional Decisions* (F. S. Crofts and Co., pp. xiv, 487) differs from the fourth in including rather full printings of two further cases in which the Supreme Court has paid its respects to New Deal legislation. These are: (1) United States v. Butler, invalidating the A.A.A. and involving, as the author points out, the first analysis of the federal spending power ever made by the Court on the merits of the problem; and (2) Carter v. Carter Coal Company, invalidating the Guffey Coal Act and significantly criticizing the doctrine of inherent national power. Minority as well as majority views are represented in the extracts printed.

## STATE AND LOCAL GOVERNMENT

Concerning the study of present-day liquor control entitled *After Repeal* (Harper and Brothers, pp. 296), by Leonard V. Harrison and Elizabeth Laine, Professor Luther Gulick points out in the introduction that its lessons of post-repeal experiences are rich for the administrator in whatever field he may be at work. Portrayed in the study are some forty states that are starting to function as independent laboratories in the administration of liquor legislation. Centralization is favored over decentralized administrative control; attempts are made to enforce provisions of liquor laws, the public becoming lethargic in supporting new liquor laws as in the case of old prohibition laws; business methods in the management of state stores leave much to be desired; the revenue motive

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from the very beginning makes an indelible imprint on the administration of control; and the problem of control is largely attacked in part and not as a whole. As a realistic approach, the authors describe how the social control of liquor is gradually shifting to control to derive revenue. A few states are noted in which the social aspects of control are emphasized. The fourteen commonwealths which have established state stores have the most complex administrative problem and, on the whole, are doing little better in administration than the license states. The quality of membership of control bodies as well as of subordinate personnel is, on the whole, mediocre. Since broad administrative discretion is essential to the success of a program of liquor control, the need for good personnel should be emphasized. The inaptitude of state legislatures in providing the right type of personnel through proper pay, tenure, freedom from politics, and administrative organization is amply illustrated. The standards by which the authors judge the effectiveness of liquor control in the various states and by the federal government are principally those suggested by the 1933 inquiry *Toward Liquor Control* by Fosdick and Scott, of which Mr. Harrison and Miss Laine were two of the chief staff assistants. The appendices occupy an important place in the study—especially the digest of state liquor control systems. This latter might have been more detailed for the maximum usefulness of the book, in view of the brevity of treatment of some of these features in the body of the volume. However, the study will serve as a much needed introduction to the subject of administration of legislation pertaining to social control.—MILTON V. SMITH

In an admirably organized and well documented study entitled *Unemployment Relief in Periods of Depression* (Russell Sage Foundation, pp. 384), Leah H. Feder surveys with considerable thoroughness the attempts made in certain cities of the United States to deal with unemployment relief during the years 1857–58, 1873–79, 1883–97, 1907–08, 1914–15, and 1920–22. Some readers will regret that the years beginning with 1929 have been omitted. Others may be disappointed that so much emphasis has been placed on cities of the East and Middle West. Miss Feder does not believe that sufficient perspective has been attained to justify including the recent depression. In an at least partially effective defense of concentration, mention is made of the significant industrialization of municipalities of the East and Middle West. Each period is discussed under such pertinent headings as Estimates of Unemployment, Emergency Measures, Work of Public and Private Agencies, Work Relief, and Public Works. The author concludes that "those responsible for unemployment relief in times of distress have so often concerned themselves solely with the immediate crisis and made no attempt to profit by earlier discoveries"—thus, breadlines, soup kitchens, and clothing centers, de-

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spite severe criticism, have characterized period after period. Nevertheless, a "searching analysis will reveal a development of trends." Coöperation of effort to avoid duplication started feebly in 1873 but by 1914 had attained considerable status. Deep-seated distrust of the competency of public agencies persisted until well into the present century, but has very recently given way to a complete acceptance of the principle of public responsibility. In the administration of direct relief there has been an increasing interest in particular needs and a gradual abandonment of mass methods.—HAROLD ZINK.

Textbooks on American state government usually abound in the mechanics of government and administration at the expense of the dynamics. The difficulties of attempting to give a composite picture of the structural arrangements of the governments of forty-eight states, from the wealth of facts about them and the dearth of data as to how their governmental and political systems actually work, perhaps precludes any other treatment. Arthur W. Bromage's *State Government and Administration in the United States* (Harper and Brothers, pp. ix, 678) provides the usual bill of fare for introductory college courses brought up to date. Proper weight is given to all the important topics; the elementary facts are well selected; and newer developments are emphasized, including those in interstate coöperation and federal relationships. Constitutions, elections, parties, the executive, the legislature, and the courts are presented in the accepted fashion. One chapter each is devoted to state administrative organization, state personnel administration, state finance, state functional services, and state regulation of business and labor. Four chapters out of the total of twenty-four are given over to local government. Practical politics, which plays so large a part in our state and local governments, is treated in the usual conventional way, that is in terms of structural and procedural variations in elections, primary and convention organization, and executive committee set-ups. The fact that the two-party system is practically non-existent in many states, and that consequently factionalism and pressure politics produce at times what amounts to chaos in the legislature and the administration, receives very little attention. A fuller treatment of this and some other equally human and interesting topics would enliven some other textbooks on state and local government as well as the one under consideration.—O. DOUGLAS WEEKS.

Coöperative effort among American municipal governments was furthered by the problems growing out of the depression. The *Proceedings of the American Municipal Association, 1931–1935* (American Municipal Association, pp. xv, 828) presents a picture of the efforts made by cities in this period to meet their problems by coöperative effort. That there are municipal leagues in thirty-six states indicates that municipal officials

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have realized that joint action is desirable in meeting municipal problems. These organizations are associations of municipalities rather than of their officers, and they perform a variety of services, among them the holding of annual conventions to discuss municipal problems, the publication of journals devoted to municipal administration, the formulation and promotion of legislative programs, and the operation of information services. The American Municipal Association is a federation of state leagues and represents an effort at coöperation on a national basis. The *Proceedings* contain some formal papers, but the greater part is given over to committee reports and informal discussion by the participants at the annual meetings. Some of the material included is of little value—addresses of welcome and speeches of introduction. The verbatim report of the informal discussion of committee reports and of municipal problems contains much valuable material, and will be of interest to all persons concerned with the administration and improvement of American local government. The advantages of coöperative effort on the part of cities, on both a state and a national basis, are apparent from a study of this record for the period 1931–35.—CHARLES M. KNEIER.

Mr. Dudley F. Pegrum's investigation of the policies of the California railroad commission in the handling of public utility security issues, presented in his *Regulation of Public Utility Security Issues in California* (University of California Press, pp. 71), is a worthy companion-piece to his earlier study, *Rate Theories and Policies of the California Commission*, published in 1932. It represents the same scholarly treatment and systematic documentation that appeared in the earlier study. It is a contribution to a rather limited body of literature dealing more or less intensively with the methods and practices of a state utility commission. Similar detailed investigations for other states are essential if valid generalizations are to be made concerning the regulation of utility properties in the United States. In his treatment of the control over procedures and practices of public utility security issues in California, Mr. Pegrum has thoroughly canvased all phases of the problem, from the powers of the commission and the technical conditions imposed by it to consolidation proceedings and the jurisdiction over securities of companies engaged in interstate commerce. One cannot but be impressed by the logical consistency with which the California commission has interpreted its powers and in the course of time blocked up the gaps which have made possible many abuses in the issuance of securities. According to Mr. Pegrum's statement, the commission has succeeded in seeing to it that outstanding securities shall represent actual prudent investment. In doing this, the commission has withstood efforts to introduce inflationary factors through the application of the reproduction-cost-new theory of evaluation. In his

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concluding section, Mr. Pegrum makes a number of constructive suggestions, many of which might well be taken to heart by a number of public service commissions. Among these, the following seem particularly noteworthy: (1) control over actual purchase price paid for one utility by another; (2) more positive control over consolidation and reorganization programs as well as "hybrid" and foreign corporations; (3) elimination of no par stock; (4) a breakdown of fair return with reference to the requirements for different classes of securities. This little volume can be studied advantageously by those interested in public utility regulation, since it gives a good account of the policies on the matter of security issues of one of the best and most progressive commissions in the United States.—WILLIAM E. MOSHER.

Dr. John P. Senning's monograph, *The One-House Legislature* (McGraw-Hill Book Co., pp. xviii, 118), appears at a most opportune time. Widespread popular interest in many other states makes his clear outline of the campaign for unicameralism in Nebraska a useful handbook for similar efforts. A foreword by Senator George W. Norris affirms his faith in the success of the new plan in his own state and expresses his conviction that a change in legislative structure is required by our modern civilization. Teachers and students of governmental institutions will find in this volume a concise summary of American and foreign experience with unicameralism and an account of the movement for legislative reform in the several states. The arguments for and against bicameral and unicameral bodies are marshalled and critically considered. In the final chapter, Dr. Senning outlines a number of suggestions for rules to safeguard the new Nebraska plan against the dangers predicted by its opponents. A comprehensive bibliography and appendices setting forth the Nebraska amendment and the redistricting plan adopted by the 1935 legislature conclude the volume. Such a book by the adviser to the legislative committees which prepared the legislation to implement the constitutional amendment is more than an academic monograph. It is an historical document which marks a milestone on the path of progress in adapting our governmental institutions to modern requirements.—HARVEY WALKER.

*Township Organization in Missouri* (University of Missouri Studies, Vol. XI, no. 4, pp. 70), by William L. Bradshaw and Milton Garrison, supplements an earlier study, *The Missouri County Court* by Professor Bradshaw, published in the same series in 1931. Since organized townships exist in only 24 of the 114 Missouri counties, the authors have had an unusual opportunity to present direct, first-hand comparisons, as well as an analysis of the history and structure of township organization. These objectives have been accomplished in a highly satisfactory manner,

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thereby making a significant addition to the literature of local government. First authorized by optional statute in 1872, seven counties have adopted township organization since 1906, the latest in 1920. All of the counties having township organization are rural. Comparison of financial data of the two groups of rural counties shows that "township organization is relatively much more expensive than county organization," is "less efficient in the assessment of property for taxation," and is "about equally efficient in the collection of taxes." The township also is found to be less efficient in handling local road administration. Finding, further, that the township is unnecessary either for democracy or for convenience, the authors conclude that township organization should be abandoned. The study should be a valuable aid toward bringing about that result.—W. ROLLAND MADDOX.

*Urban Local Government in Texas* (University of Texas Publications, pp. xi, 357), by Roscoe C. Martin, is a thorough functional analysis of local government in five Texas counties: Harris (Houston), Dallas, Bexar (San Antonio), Tarrant (Fort Worth), and El Paso. These counties have within their boundaries a total of 285 governmental units, and are designated by the United States census of 1930 as metropolitan areas. The author states in his preface, however, that at present the local problems are urban rather than metropolitan. The book is not limited entirely to urban government, as attention is given also to special districts and counties. The study treats the following topics: the problem, finance (including records, reports, and research), public safety (including health and waste disposal), education and social services, public works, and trends. Thus it includes both "line" and "staff" functions. With each chapter, and also each part, there is an admirable conclusion containing criticisms and recommendations. The descriptive material is supplemented by forty-three tables. In the last chapter, Professor Martin proposes reorganization of each of the areas by making use of the county home rule amendment to the constitution to adopt an integrated system of administration. Certain functions of a metropolitan character should be transferred to the reorganized county. The study is well done, and the suggestions contained warrant serious consideration by the residents as well as the officials of the areas.—W. V. HOLLOWAY.

In their study, *Governmental Reform in Texas* (Arnold Foundation, Southern Methodist University, pp. 49), S. D. Myres, Jr., and J. Alton Burdine present a review of reforms which they consider necessary in the government of Texas. Other works of a more specific character and more comprehensive in scope are frequently cited, and an excellent summary of proposed reforms appears in the last few pages. The executive, judicial, and legislative departments are considered first, and surveys of

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local government and of the Texas constitution follow. The study appears to have been written primarily for the layman, to interest him in his state and local government, and to point out weaknesses in the system. But so much interesting and valuable material is presented that the work should prove of considerable value also to political scientists and public officials, and of other states as well as of Texas.—R. L. CARLETON.

Since any acceptable basis for state aid to public education calls for a reliable measure of local taxpaying ability, and since assessed value of property is recognized as a very faulty measure, school and tax authorities would welcome the discovery of an ability index based on readily obtainable economic data. They will therefore be interested in a study by Francis G. Cornell entitled *A Measure of Taxpaying Ability of Local School Administrative Units* (Bureau of Publications, Teachers College, Columbia University, pp. 114). Taking the counties of New York as units of comparison, the author succeeded in devising an ability index which correlated more closely with true value of property than did assessed value. The formula was obtained by properly weighting eight economic factors—population, retail sales, automobile registrations, number of income tax returns, etc. The author is careful to point out that the index is still imperfect and that the test was too limited to be conclusive. Nevertheless, the search for such a formula is commendable and should be pursued farther.—PAUL W. WAGER.

Blake McKelvey's *American Prisons; A Study of American Social History Prior to 1915* (University of Chicago Press, pp. xix, 233) is a brief sketch of the development of prisons in the United States. The only other book in existence covering similar ground, but stopping short at 1845, is O. F. Lewis' *The Development of American Prisons and Prison Customs from 1776–1845*. McKelvey's book supplements Lewis' by carrying on the history for another seventy years. The volume is written in an easy style and clearly states the main points in the development. The author has done a particularly good job in delineating the development of penal and correctional measures in the Southern states. He has also made a contribution in pointing out the psychological ebb and flow in penological theories during the last hundred years. The chief defects of the book are due largely to the fact that it is a mere outline. This leads the author to make somewhat general statements for which he provides no historical evidence. While the bibliographical notes at the end of each chapter cite most of the important literature, it is unfortunate that for some of his broad statements Mr. McKelvey gives no direct references. A few errors of fact might have been avoided by more careful checking.—JOHN L. GILLIN.

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June Purcell Guild's *Black Laws of Virginia* (Whittet and Shepperson, pp. 249) traces the legal status of Negroes in Virginia from the earliest legal records through the present acts of the general assembly. The laws are arranged chronologically and topically under ten chapter headings. The arrangement and the author's brushing up of legal verbiage add to the volume's readability. Its interest lies largely in the attitudes toward racial and social problems which the law often reflects. The volume shows the progress made in lifting the Negroes' legal disabilities. To be sure, legal inequalities still exist, but the author attributes these, not to the substance of the law, but to its administration. She believes that much of the Negroes' sorry economic condition is the "result of white aggression and white discrimination." The author, however, makes few comments; she rarely draws general conclusions, seeing no need to do so, because "the laws speak eloquently for themselves." The volume's importance would have been enhanced by brief annotations of the judicial decisions that bear on the laws summarized.—JAMES E. PATE.

*New York Advancing* (New York Municipal Reference Library, pp. 368), edited by Rebecca S. Rankin, is an interim report of the work of the Fusion Administration of New York City under the direction of Mayor F. H. LaGuardia. It is presented in eleven chapters dealing with administration, finance, public works, taxation, education and recreation, legal protection, protection of life and property, miscellaneous staff agencies, emergency relief, and charter revision. Achievements are discussed with reference to objective standards, where available, and in their absence by comparison with the records of the preceding government, while some attention is given also to failures, in some cases due to lack of coöperation.—JOHN A. FAIRLIE.

Anyone who has attempted to collect official papers of the forty-eight states will appreciate the compilation of materials contained in *Official Publications Relating to American State Constitutional Conventions* (H. W. Wilson Co., pp. 91). This is a planographed bibliography compiled by the document section of the University of Chicago Libraries listing "officially published material" by states. The publication is also "essentially a union list of holdings for all the libraries in Chicago, for the Library of Congress, and for the New York Public Library." Other libraries are listed only if they hold some unique local material.—C. I. WINSLOW.

### FOREIGN AND COMPARATIVE GOVERNMENT

The National Government, says Mr. Ramsay Muir in the preface to his *The Record of the National Government* (Allen and Unwin, Ltd., pp. 204) is "the worst, the weakest, the most timorous, and the most incompetent government that Britain has known since the days of Lord North."

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One is reminded of that more-than-usually celebrated cartoon of Low, published about a year ago, called "Missing the Bus," in which a forlorn person labelled "National Government" is seen standing at a deserted street corner reading a sign which says "Next Bus: After the War." Though the reviewer himself feels considerable sympathy with the views of Mr. Low and Mr. Muir, he must point out that the volume at hand, like many of Low's cartoons, is to be taken rather as a piece of partisan propaganda than as an example of that sort of impartial history (e.g., the *Short History of the British Commonwealth*) which Mr. Muir wrote some years ago. Today, Mr. Muir writes as the apologist of the Liberal party, in which he has long held high position, and this volume is a successor to *Peers and Bureaucrats* (1910), which attacked the irresponsibility of the House of Lords and of the government departments, and *How England is Governed* (1930), which with merciless eloquence castigated the civil service and the electoral system. The reader who bears in mind this word of caution will find *The Record of the National Government* not only readable but informative to a high degree. Mr. Muir begins with the story of the financial difficulties in which the country had begun to be involved long before 1931, shows how the first National Government rested on a sound basis of general coöperation in a crisis, and then traces the growing dominance of the Conservative leaders through the election of 1931 and the imposition of tariffs contrary to the will of the Liberal supporters of the government. Then he analyzes the work of the second National Government by major topics. He examines its handling of national finance and its "principal achievement," the "introduction of a system of Protection," with a separate chapter on the Ottawa Agreements. Other chapters summarize its attempts to relieve the problem of unemployment and the situation of agriculture. In a final chapter, the author surveys the National Government's foreign policy. Contemporary history is the hardest of all to write, and few are interested in writing it. Some prejudice can be excused the performer of a rare accomplishment. Mr. Muir has put together the story of the policies and accomplishments of the English cabinets that have ruled since 1931; he has made the story intelligible and interesting. Although supporters of the National Government can challenge his interpretations, they can hardly challenge the accuracy of his facts.—E. P. CHASE.

*The Life of Emmeline Pankhurst* (Houghton Mifflin Co., pp. 180), by her daughter E. Sylvia Pankhurst, is a chronological biography of the militant feminist. It presents also a fair picture of English political party attitudes in the great parliamentary reform era, 1880–1918. Emmeline Goulden Pankhurst, 1858–1928, was by heredity, background, and temperament a militant. She sprang from a long line of fighters; her paternal

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grandfather narrowly missed death in the franchise demonstration in Manchester in 1819, and her grandmother was a member of Cobden's famous Anti-Corn Law League. Emmeline's young mind was early disposed to rebellion, when the restrictions, then prevalent against her sex, impeded her activities. She lived in a period of great struggle for constitutional liberty in which her parents took part, and she grew up in Manchester, which was the center of the women's emancipation movement. Her entry into politics occurred as early as 1879, and from that time her life became a series of battles for the emancipation of women. Her position as registrar of births and deaths brought her into contact with many unfortunate women, whose stories of wretchedness excited her wrath and pity, sharpened her sense of social justice, and served to feed her zeal. Between 1908 and 1914, she was in and out of prison because of her militant activities in the suffrage cause. She was a true zealot, willing to suffer the extremes of bodily discomfort for her cause, which she considered greater than herself, her family, or any other person, no matter how exalted his position in party or state. This story of her life presents nothing startlingly new, but it does give a personal view of a great woman by one who knew her intimately as daughter and aide.—ELIZABETH WEBER.

James Bunyan's *Intervention, Civil War, and Communism in Russia, April–December, 1918* (Johns Hopkins Press, pp. ix, 594) is the third volume of documents bearing on the Russian revolution, following chronologically Frank Golder's *Documents of the Russian Revolution, 1914–1917*, and Bunyan and Fisher's *The Bolshevik Revolution, 1917–1918*. The first two were brought out by the Hoover War Library (Stanford University). This latest work follows closely the method and format established by its immediate predecessor—an elaborate table of contents, an extensive bibliography, a chronological table, and an index. The general scheme of division is: three chapters to the rival interventions of the Central and Allied Powers, three to the Civil War, and the remaining four to newly created revolutionary institutions, with a final chapter of *varia* called "Sidelights of the Russian Scene." Each section of documents is prefaced with a condensed summary which gives continuity to the narrative of events by documents. Especially interesting are excerpts showing Lenin's attitude toward the Cheka, the early, futile attempts to control that powerful organization, and selections from the extremely rare report by Latsis on the work of the Cheka. The following famous statement by Latsis (p. 261) is taken from the *Pravda*, December 25, 1918: "Do not ask for incriminating evidence to prove that the prisoner opposed the Soviet either by arms or by word. Your first duty is to ask him what class he belongs to, what were his origins, education, and occupation. These

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questions should decide the fate of the prisoner. This is the meaning and essence of Red Terror." (Items such as this make strange reading in 1937, when Bolshevik policy, as expressed in the new constitution, presumes to disregard class origin utterly for a new method of selecting the leadership for the country on the basis of talent, merit, and efficiency.) Also of compelling interest, because of current significance, are documents indicating the Bolshevik attitude in 1918 toward the Red Army, world revolution, the constitution of RSFSR, moneyless economy, etc. To the student of the Russian revolution, this volume by Mr. Bunyan is very welcome, revealing many details hitherto obscure. One might well wish for additional information as to the exact geographical location of so many valuable Russian documents, to which the average student cannot obtain access—even in Moscow. It has been supposed that the Hoover War Library is the only depository in America of many of these materials; it would be valuable to students to know of other treasures, perhaps closer to hand. Apparently Mr. Bunyan made considerable use of the materials in the Hoover War Library, which, in an earlier volume, announced the intention to include in its series documents of the period covered by Mr. Bunyan's present work. Since there is no announcement that the Stanford project has been abandoned, it may be assumed that this period will be the subject of another volume in the Hoover series.—BRUCE HOPPER.

Harold R. Weinstein's *Jean Jaurès* (Columbia University Press, pp. 200) does not purport to be a full-length portrait of its subject. It concentrates, perhaps wisely, on certain aspects of Jaurès' political career—in particular, his attitudes bearing on the socialist doctrine in relation to the internal class struggle and to foreign policy and war. The study, which is well documented and interestingly written, though in the traditional vein, tells the story of Jaurès' shift from bourgeois Jacobinism to bourgeois socialism, and of his struggle in behalf of "revisionist" and "patriotic" Marxism against extreme class-conflict doctrines on the left and chauvinism on the right. The author makes a good case for his statement that "the assassination of Jaurès was an ironic tragedy," and the point is stressed throughout that considerations of patriotism and social welfare were dominant in the leader's life. Strongly imbued with the Revolutionary tradition of patriotism, and with an almost mystical concept of the "nation," Jaurès had been driven into socialism in the early nineties not merely because of his fears of "the financial oligarchy," but also because of his belief in "La République Sociale," and his conviction that "socialism was the progeny of the Revolution." But it would have been a French socialism, a genuine democratic collectivism, rather than an international socialism based on the class conflict. He would have

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stoutly defended the Republic against external attack, and, during the crucial week preceding the outbreak of the world holocaust, and only two days before his assassination, he was able to say at an international socialist conference that the French government not only desired peace, but was pursuing it. The concise chapters on revolutionary syndicalism and the conflict within the Unified Socialist party are of special value.—G. BERNARD NOBLE.

The *China Year Book*, 1936 (North China Daily News, Shanghai' American agents, the University of Chicago Press, pp. xxiv, 511), is the eighteenth issue of an indispensable compendium of statistical and historical data. Begun in 1912, it has appeared at varying intervals—annually since 1930—throughout the whole period of the Republic, and always under the editorship of H. G. W. Woodhead. The current volume brings the record to September 7, 1936. By condensing the historical materials, omitting official documents hitherto published, and including fewer new documents, the editor has found space for four additional chapters—on Kuomintang sessions, public health, the National Economic Council, and the cinema—and has been enabled to employ larger type. The wide scope of former issues is maintained, exhibited in such titles as "Who's Who," education, river conservancy, government, international relations, labor, and religions, in addition to statistics of foreign trade, banking, public finance, etc. Authoritative contributors from outside the editorial staff continue to lend distinction to the book.—HAROLD S. QUIGLEY.

Volume 23 of the *Jahrbuch des öffentlichen Rechts der Gegenwart* for the year 1936 contains two articles on "Recent Constitutional Developments in France" by Professor René Capitant, of the University of Strasbourg, and Dr. Karl Braunias, of the University of Vienna; an article on "Administrative Law in Russia Since 1917" by N. Karadshe-Iskrow; one on "Constitutional Law in Czechoslovakia, 1929–1939," by Dr. Fritz Sander, of the German University in Prague; an article on the "Present Position of Federalism in the United States" by Professor Carl J. Friedrich and Dr. Wolfgang Kraus, of Harvard University; and one on "The Constitution of the Kingdom of Siam" by Prakob Hutasingha.

It is a pleasant duty once a year to chronicle the appearance of a new edition of *Political Handbook of the World*, edited by Walter H. Mallory and published by Harper and Brothers for the Council on Foreign Relations. The current edition (pp. 207) presents, in the usual convenient form, full and carefully authenticated information concerning parliaments, parties, and press throughout the world as of January 1, 1937.

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INTERNATIONAL LAW AND RELATIONS

David Mitrany's *The Effect of the War in Southeastern Europe* (Yale University Press, pp. xiii, 282) is an excellent survey and summary based primarily on the volumes dealing with this section of Europe which have appeared in the Carnegie Endowment's *Economic and Social History of the World War*. The emphasis is on economic factors, with less attention to what might perhaps narrowly be termed the sociological and cultural aspects. The old Austria-Hungary affords the majority of the material, and the many efforts made toward the establishment of economic unity among the Hapsburg dominions are outlined historically. No sooner had the customs union between Austria and Hungary been concluded in 1850 than it was dissipated by the Ausgleich of 1867. The constant struggle for economic privilege between the dual governments and among the multitude of nationalities turned economic unity in practice into a "ghostly fiction," even before the war began. The war plans, here as elsewhere, were very complete for a military aspect, but inadequate as to economic organization. The many instruments of war government—the famous Centrals—worked autocratically, but in spite of many clashes between civil and army authorities made a creditable record. The progressive difficulties of the war years are pictured, although one would welcome a more specific treatment of the ever tightening blockade. Tribute is paid to the remarkable efficiency of the old bureaucracy which made it possible for Austria-Hungary to fall apart one day and start working as new succession states the next. The peace treaties receive no fashionable blanket condemnation, although they are surveyed critically. The "feat of welding the conglomerate of Danubian peoples into a political and economic unity without oppressing their national individualities"—the problem "which had baffled and in the end defeated the Hapsburgs—still remains with Europe." In an appendix the author considers the Turkish-Greek exchange of populations and concludes that a similar plan would be no solution for Southeastern Europe.—E. C. HELMREICH.

Dr. Gerhard Schacher's *Central Europe and the Western World* (Henry Holt and Co., pp. iv, 224) is a translation of a book published at Prague in 1936 under the title of *Mitteleuropa und die Westliche Welt*. Within its modest bounds is compressed a thoughtful and lucid exposition of the economic, and to some extent the political, situation in the area with which it deals—an area which the author rightly describes as having become, apart from the Far East, "the most dangerous center of crisis in the world." Seven chapters are devoted specifically to economic matters. In discussing such topics, too, as the Little Entente, the Rome pacts, the Anschluss, and Hungarian revisionism, the author gives evidence of substantial agreement with Walter Rathenau's famous aphorism, "econom-

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ics is fate." Sundry developments of the past few years have encouraged observers to believe that the Balkan states in particular are slowly working out a better international order for themselves, with some chance of ultimate success if only the Great Powers will have the good sense (which they probably will not) to keep hands off. Dr. Schacher, however, is not very optimistic; sooner or later, he contends, "the decision will have to be taken to make a clean sweep of the inflammable material." How such an end can be attained without igniting the tinder in the process, he fails to disclose; although it is only fair to say that the task to which he addresses himself in the present book does not extend much beyond the diagnosis of existing ills.—F.A.O.

Together with the original volume, published in 1926, the *Supplement to the Law and Procedure of International Tribunals* (Stanford University Press, pp. 211), by Jackson H. Ralston, covers the law as developed by international tribunals from 1910 to date. The two volumes are organized similarly and use the same paragraph numbering, so that a topic may be followed easily through both. Together, they make a most useful handbook on the jurisdiction, procedure, and law applied by arbitration commissions and other international tribunals. During the period 1926–36 covered by the Supplement, the Permanent Court of International Justice, the various Mexican Claims Commissions, and the arbitral judges of claims between Spain and Great Britain and between the United States and the former Central Powers have added much to the source material. The work of the Permanent Court has been included through the Chinn case, No. 63 in the Combined Series, and has been cited extensively. New subjects appear, such as the status of treaties not registered with the League of Nations, the rights of third states under treaties, rules governing oral evidence, and problems of foreign exchange in meeting claims. Much new material is given on such subjects as the Calvo clause, rules governing succession to claims and administrative decisions, *uti possidetis juris*, prescription, and the variable standards determining denial of justice. In the last field, the author points out the unfortunate practice of holding states liable to claimants for damages when insufficient punishment has been meted out to offenders against such claimants, thus giving them a vested right in the proper administration of justice. Like the original work, this Supplement is invaluable for reference.—HAROLD J. TOBIN.

For students of the peace movement, a recent book of the well-known pacifist Barthélemy de Ligt, *La Paix créatrice; Histoire des principes et des tactiques de l'action directe contre la guerre* (Paris, Marcel Rivière, pp. 536), will be a welcome contribution. The moral force doctrine, the direct action, individual and collective, against war, has never been

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treated so comprehensively as in this book. From every epoch and from all parts of the world, the author has collected movements and theories which have in common the belief that only the moral or religious revolt of enlightened individuals or groups can conquer the time-old menace of war. The picture drawn by the author is, however, purely descriptive, containing without doubt many important and significant data, but lacking an inner system or an historical-sociological explanation of the doctrines or facts treated. It is rather a catalogue than a scientific approach to the problem. Fortunately, in a preliminary chapter, Mr. de Ligt gives his personal attitude toward the problem, which contains interesting suggestions, before all that the pacifistic *action directe* should be construed not as passive resistance but as a purposive awakening and organization of moral energies, "the fight of the free personality against militarist slavery." His polemics against socialist and bolshevik pacifism are interesting.—Oscar Jászi.

*World Trade and Its Future* (University of Pennsylvania Press, pp. 101) embodies five lectures delivered at Swarthmore College in 1936 by Sir Arthur Salter. The first three lectures sketch the significant facts of world trade prior to the World War, following the War, and during the Great Depression. These facts, while oft-repeated, are presented here in bold outline and with unusual clarity. The fourth lecture is devoted to a discussion of the economic factors in the present situation which are likely to influence and determine the course of future world trade. These factors are: the downward trend of population in the Western nations; the unstabilized currency situation; the recent course of foreign investments; the existence of tariffs, quotas, and exchange restrictions. On the basis of his analysis of the above factors, Salter recommends the adoption of a number of policies which he believes would result in the growth and stability of international trade. These include (1) coöperative action to stabilize exchange rates through the use of stabilization funds; (2) coöperation between central banks to maintain "a reasonable stability in the general level of gold prices"; (3) establishment of tariffs on the basis of a unified national program; and (4) expansion of world trade through a series of bilateral and multilateral trade treaties. There need be little doubt that the author's proposals would expand and give greater stability to world trade. His program, however, calls for national leadership and international coöperation which in the present dark hour do not exist. —Nathan L. Silverstein.

In *Justice and Equity in the International Sphere* (Constable and Co., pp. 59), Professors Norman Bentwich of the Hebrew University of Jerusalem, Gustav Radbruch of Heidelberg, H. A. Smith of the University of London, Antonio S. de Bustamente of Habana University, and Donald

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A. Maclean of the Catholic University of America contribute brief essays on the philosophical, historical, legal, and moral aspects of the subject. The first essay, by Professor Radbruch, is a philosophical-legal discussion and evaluation of the idea of equity, especially in relation to the proposal of the New Commonwealth Institute of Research for an equity tribunal. He concludes: "An equity tribunal can only come into being when, on the one hand, judges can be found who will without hesitation subordinate the interests even of their own nation to the common good of the world, and when, on the other, an international mind has developed in every community which will support, echo, and authorize such decisions" (p. 13). Professors Smith and Bentwich contribute essays on "interstate disputes in the American Supreme Court" and "The Jurisdiction of the Judicial Committee of the Privy Council." Judge de Bustamente, whose essay is entitled "The First Court of International Justice and the Cause of its Dissolution," deals with the history of the Central American Court of Justice. The concluding essay by the Reverend Maclean is concerned with "International Justice and Equity from the Christian Point of View."—FRANK M. RUSSELL.

In *The League of Nations and World Order* (Constable and Co. Ltd.' pp. 191), Georg Schwarzenberger studies the principles of universality in the theory and practice of the League of Nations. Brief preliminary chapters sketch the "imperial universality" of Rome, the "theoretical universality" of the medieval church, and the newer conception of "co-operative universality" based upon a system of independent national states. In the light of his study, the author raises the question "whether the world has integrated sufficiently today to permit the assumption that a comprehensive and world-wide system of states already exists" (p. 175). He is convinced, however, that this integration must be realized before peace can be attained, for space-annihilating inventions have made it impossible to achieve a peaceful world by way of regional and continental peace systems. If a collective will is absent, upon what driving forces may a universal peace system be based? Principally fear, and perhaps to some extent shame. These, however, are not enough. Any collective system which the nations will be willing to endow with sufficient power to meet a common danger must be above favoring the interest of any particular state or states. Therefore it not only should be equipped with machinery for prevention of war and the maintenance of the *status quo*, but should be provided also with adequate means for bringing about peaceful change.—FRANK M. RUSSELL.

The second revised edition of Harold M. Vinacke's well known *A History of the Far East in Modern Times* (F. S. Crofts and Co., pp. xiv, 556) differs from its predecessor, published in 1933, mainly in the rewriting

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of what was formerly the concluding chapter and the addition of a new fifty-page chapter, "The New Far East," dealing with developments in 1933–36. By the "new" Far East, the author means chiefly the Sino-Japanese world as transformed by the Japanese military operations on the mainland since 1931; and his chapter is devoted to a very good analysis of the nature and significance of those operations, together with discussion of such vital matters as non-Japanese foreign rights in Manchoukuo, the Mongolian question, and the future of the Philippines. What has happened on the various Far Eastern sectors, and with what possible consequences, one will find indicated briefly and clearly; if it is prophecy that one is after, other and less cautious writers will have to be consulted.—F.A.O.

The *Soviet Union and the Cause of Peace* (New York: International Publishers, pp. vi, 191) is a convenient and attractive volume of anti-Fascist and pro-Soviet propaganda. Stating openly in their preface that Japan and Germany are the most threatening "war-mongers" and that the hope of peace lies in the U.S.S.R., the editors have brought together selected writings and addresses on international relations by Lenin, Stalin, Molotov, Voroshilov, Tukhachevsky, and Litvinov. These cover a span of about eighteen years from the time of the November revolution. There is no attempt at completeness in the collection of the papers of each man, nor is there any summary or analysis of Soviet policy in practice. A concluding section of about twenty pages incorporates some recent Soviet agreements of non-aggression (Rumania, 1933) and mutual assistance (France, 1935; Czechoslovakia, 1935; Mongolia, 1936.)—Walter H. C. Laves.

The seventh volume of the *Diplomatic Correspondence of the United States: Inter-American Affairs, 1831–1860* (Washington: Carnegie Endowment for International Peace, pp. 485), deals exclusively with Great Britain and Anglo-American interests in Latin America. The Texas question, the inadequacies of the Clayton-Bulwer treaty, the vigorous protests against British efforts to secure a foothold on the Mosquito coast, the American desire for Cuba, and the complicated problems of filibustering in the Central American states constituted the main matters of diplomatic concern. Some of the ablest Americans of the day, ranging from Martin Van Buren to James Buchanan, George Bancroft, Abbott Lawrence, and Edward Everett, occupied the American Legation in London and constituted, for the most part, worthy antagonists for Lord Palmerson. Like its predecessors, this volume's adequate index, thorough annotation, and intelligent selection of material bear testimony to Editor William R. Manning's competent scholarship.—W. B. Hesseltine.

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POLITICAL THEORY AND MISCELLANEOUS

Can we plan society economically within the framework of our traditional civil liberties? Such is the question raised by George Soule in *The Future of Liberty* (Macmillan Co., pp. 187). Our current conflict between loyalty to traditions and the necessity of social change is described, but the author comes to the conclusion that a rejuvenated liberty can be attained under a planned economy of abundance. A negative, non-interference theory of liberty, such as presented by John Stuart Mill, has little reality when it is applied to the modern American citizen. Restrictions on the liberty of predatory groups, according to this volume, cannot be deemed a destruction of the liberty of those who are working for a common social purpose. In effect, the liberty of property-owners, which Mr. Soulè includes in the traditional enumeration of civil liberties, may be subject to sharp restriction, or even destruction, without entailing a like treatment of the substantial freedom of the masses. Thus the future of liberty is bright under socialism, while it is amply dark as the situation stands at present. One of the primary values of this work, however, is that the author has ably summarized the story of the rise of the Liberty League and other similar groups. He has thrown a merciless light of criticism on the limited mentality and understanding of certain leaders who have tried to influence Congress against the public regulation of industry. Basically, the book stands for the proposition that any solution other than a genuinely planned economy will fall short of the mark. Indeed, it would be easier, according to the author, to inaugurate socialism than to reëstablish a free, competitive economy (p. 125). The imaged and detailed picture of this new society is inviting, but Mr. Soule's critics may wonder whether liberty will be like that of our traditional system if "what we ought to fear most of all is the violence and dictatorship that are likely to be applied by the rulers of the existing society in their extremity, if they come to be seriously threatened" (p. 180).—FRANCIS G. WILSON.

The claim has been advanced that the so-called racial legislation (*Rassegesetzgebung*) in Germany finds support and even justification elsewhere, particularly in the United States. This dictum determines the objective and method of a recent publication *Das Rassenrecht in den Vereinigten Staaten*, by Heinrich Krieger (in the series *Neue Deutsche Forschungen*, Junker und Dünnhaupt Verlag, Berlin, pp. 361), which is asserted to be the first comprehensive presentation of legislation affecting racial relationships in this country. The work as a whole is appropriately organized, and its bibliography may prove valuable for American readers. The chapters dealing with racial discrimination in the several fields of legislation (including the constitutional amendments and pertinent decisions on the

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emancipation of the Negro, and concerning the American Indian, immigration and citizenship, interracial marriage, civil rights, education, due process of law, and suffrage) are well written. The development and actual legal status of racial minorities are described clearly, and the accompanying statistics and tables are significant and based on good authority. No doubt, however, the fundamental preconception of the author mars the value of the enterprise. Contradictions arise from prejudice, as for instance when an economic and political ability "dangerous" in competition with the white man is ascribed to the Negro (p. 340), whereas in earlier parts of the book the latter's "inferior racial character" is cited, and this without any further definition. Likewise, an "elementary racial feeling" is alleged to be the underlying impetus of the most essential legislation in the United States, while it is evidently not powerful enough to break the strength of the assumedly futile "ideology of equality." A rather arbitrary interpretation is noticeable also with regard to the latest developments in legislation concerning the American Indian (act of June 18, 1934). Notwithstanding the author's doubts as to whether a final settlement can be achieved on this basis, it should not be denied that in the voluntary character of coöperation therein envisaged lies a recognition of established principles. Moreover, the fact that the individual Indian is permitted to give up his connection with his tribe and become subject to ordinary law distinguishes this measure sharply from compulsory restrictive legislation such as has been enacted in Germany. The author minimizes unduly the significance of power-relationships which result from economic and social conditions. For to both racial irrationalism and racial egalitarianism applies the statement that they are only partly stationary doctrinal concepts, and partly also a matter of social arrangements. That there is an evolutionary trend toward conformity with the changes in social views and structure, even the author admits. The facts warrant the conclusion that in America racial dogmatism, with its concomitant inequalities and injustices, is constantly subjected to a corrective process which is reflected in legislation and the administration of the law. The polemic against the idea of equality (p. 315 ff.) and in favor of a reactionary interpretation of the due process clause seems to miss the point. ("Due process of law" is rendered by the much less distinct *Billigkeit*, which may be responsible for some inadequacies.) For the author fails to recognize that equality is above all a *moral* concept, and that as such it may be expected to continue as the directing standard—in spite of occasional deviations—for future legal developments as well. Thus it would remain true that the doctrine of natural rights (equality), like Christianity, "will probably have to be absorbed, rather than destroyed, by a new ideology" (Crane Brinton). At any rate, the thesis that would make the problems of American law-

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making throughout appear in the light of racial antagonism, and even forecast their issue in a growing race struggle, with a rigid code of racial law as the final outcome, is unsupported by actualities.—H. P. JORDAN.

Present political problems, enthusiasms, and discontents keep the memory of Baron vom Stein alive among Germans and non-Germans alike. This latest study bears eloquent witness to such persistent preoccupation. In *Napoleon's Nemesis: The Life of Baron Stein* (Charles Scribner's Sons, pp. 306), Constantin de Grunwald, a Russian writer who describes himself as a friend and guest of France, gives a new portrayal of the great reformer "as he was, typical and representative of the Teutonic race, with its qualities and defects, standard-bearer of the imperial and national Germanic idea—a man of the sequence Luther-Bismarck-Hitler" (p. 12). The book, which was originally published in France (and has been ably translated from the French by C. F. Atkinson), was intended to fill a gap in the French literature on the period. But it will doubtless prove of some value also to those dependent on the literature available in English. The political scientist primarily interested in the administrative and social reforms connected with Stein's name will still have to rely primarily on Professor Ford's scholarly volume and on Seeley's older monumental and loosely-knit tomes. Grunwald has had the advantage of utilizing two most important contributions of German research which were not available to Professor Ford: M. G. Ritter's "definitive" biography and E. Botzenhart's edition of Stein's correspondence and memoranda. This study may be described as a sound biography, popular in the best sense. While only one chapter is devoted to the great reforms, the accent is placed on the unfolding of the administrator's and statesman's personality throughout a critical period of German and European history. In the end, he emerges as one of the forerunners of that German statecraft and political emotion which have gone into the making of the Third Reich. Despite the general validity of the thesis, some caution might be urged in view of Stein's firmly Christian mold. There is a very adequate bibliography in the volume which helps to supplement that of Count Montgelas in his article in the *Encyclopaedia of the Social Sciences*. No doubt the book will prove stimulating and suggestive to those, for instance, who care to be reminded that, according to a good deal of historical evidence, successful administrative reform is hardly a matter of purely technical concern.—WOLFGANG H. KRAUS.

*The American Problem of Government* (F. S. Crofts and Co., pp. ix, 701) is a revised edition of a book by Chester C. Maxey published originally in 1925. The number of pages has been increased from 497 to 701, but the number of chapters reduced from forty-six to twenty-seven. The revision seems, however, to have proceeded unevenly. The discussion of

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state legislatures was written before Nebraska's adoption of the unicameral system, and an early chapter refers to the Philippines as an unincorporated territory, while other chapters trace the New Deal through the summer of 1936 and describe the new Philippine Commonwealth. Whatever we may think of the book, we must admire the author's courage in attempting to encompass all the social sciences in one volume. He bestrides the fields of history, sociology, and politics like an academic colossus. Though concerned primarily with the United States, there is scarcely a governmental system, ancient or modern, that escapes his attention. Through time and space he stalks, in seven-league boots, from the dawn of history to the New Deal, and from the Orient to the Occident. Inevitably, a few errors have crept in. We are told that impeachment of judges "requires a two-thirds vote in both houses," and that the number of units of government in the United States is "at a minimum 50,000," whereas Anderson's study lists 175,418, and the Bureau of the Census reports 194,632. Professor Maxey has a remarkable vocabulary and a journalistic literary style. He is usually objective, but is occasionally dogmatic on moot questions; thus, our system of checks and balances "has won the reputation, both at home and abroad, of being one of the most successful systems of government on earth," and judicial review is "the most stabilizing force in the American governmental process." The book will be found useful in survey courses which attempt to present the whole panorama of political institutions and problems in one or two semesters.—ROGER V. SHUMATE.

In his *Sam Adams, Pioneer in Propaganda* (Little, Brown, and Co., pp. 437), John C. Miller has thrown valuable light, not only on the part played by Samuel Adams, but also on the problems, events, and accomplishments on the road to free and effective government in that great formative period of American history in which Samuel Adams played a leading part. He has made careful use of source materials from which he has pieced together significant details of the history of the period. The book is well written, thought-provoking, and exceedingly interesting. In it, we see Samuel Adams as a radical propagandist carrying on relentless war, first in Massachusetts, and later in other colonies and in the Continental Congress, against the British government. We see him neither asking nor giving quarter, constantly and courageously striving to kindle and keep alive the flame of rebellion against the mother country, winning converts by appeals to prejudices rather than by appeals to reason, and using conspiracy, intrigue, and even violence, when in his opinion necessary or desirable in order to attain the ends sought. The author makes it clear that while Adams was a radical in the struggle against England, he was, even then, quite reactionary in other matters, such as religion,

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and that all elements of liberalism left him, at least temporarily, before the adoption of the American constitution and the outbreak of the French Revolution. On the whole, the author has done a good piece of work, involving research over a considerable period. He might, however, have presented his material much more concisely.—DANIEL B. CARROLL.

The first half of Whitehead's *Leadership in a Free Society* (Harvard University Press, pp. 259) is a significant continuation of the analysis of impediments to industrial morale to which Elton Mayo called attention in his *Human Problems in an Industrial Civilization*. Like that study, it makes use of social-psychological insights in examining industrial administration. The most significant new data for this book are furnished by researches carried on by the Western Electric Company. This kind of analysis suggests a whole new area of study for researchers in public administration. The fact that Whitehead and Mayo have taken their data from private industry does not rob their hypotheses of significance for personnel problems in public administration. The last half of the book includes a number of chapters devoted to important aspects of political theory, but makes no significant contribution. The basic philosophy, despite a sensitive humanitarianism shown throughout the book, is a kind of Burkian historical conservatism, modified by a Rotarian hope that "the business man" will come to see his true responsibility to become the leader of a "free society."—CHARLES MCKINLEY.

In his *Manual of American Government* (Burgess Publishing Co., pp. 122, mimeoprint), Paul C. Bartholomew has undertaken the difficult task of applying the hand-book idea to the subject of American government. The result is a well organized volume, convenient to use, which serves both as an outline and as a rather full digest of the subject. Its outstanding feature is the summarizing of content to such a degree as to leave both the instructor and the student free for wide use of lecture and collateral material. By stripping the subject of all verbiage and illustration, the author has been able to present a surprising proportion of the essentials of American government within the confines of 122 pages. The treatment of subject-matter and the apportionment of material are according to the orthodox plan.—GILBERT G. LENTZ.

German-Americans during the years of neutrality had the difficult task of defending the Central Powers against the antagonistic American press. Later, in the midst of a suspicious and oftentimes hostile population, they had to wage war against their homeland. Professor Carl Wittke's *German-Americans and the World War* (Ohio State Archæological and Historical Society, pp. 223) is an able study of their conduct and opinions, and dispels many misconceptions about them. Being based almost ex-

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clusively on the German-language press, particularly in Ohio, it is limited in scope. Although less intemperately expressed, many of the views of these German-Americans were held by other people. Peace sentiment, the strength of which Professor Wittke under-estimates, was widespread among Americans as well as German-Americans. One thing Professor Wittke definitely proves is that the German-language press was as undependable as the American-language press in interpreting the war.—H. C. PETERSON.

*Brookings: A Biography* (Macmillan Co., pp. xi, 334), by Hermann Hagedorn, is intensely interesting because it sketches without cluttering details the story of an amazing career, and genuinely significant because it portrays with sympathy and skill but without exaggeration "the spiritual growth of a self-made man" (p. vii). As a philanthropist, Brookings gave himself as well as his money. He had the divine spark because of his passion for creating socially useful things, each time with broader vision. Only his last creation, the Brookings Institution, bears his name. Mr. Hagedorn's insight into the spiritual growth of a man is a notable biographical achievement.—JAMES HART.

In 1921, there began to appear *A History of France from the Death of Louis XI* by John C. S. Bridge. The first four volumes gave in greater detail than any other work which has yet been published in English the political, diplomatic, and military history of France from 1483 to 1515. They were marked by wide research in the printed sources and a distinguished style. In the fifth volume (Clarendon Press, pp. xvi, 366), the author stops the progress of his narrative in order to describe in all of its phases the situation in France at the time of the accession of Francis I. —C. P. HIGBY.

*In 1936* (Henry Holt and Co., pp. viii, 620), by Alvin C. Eurich and Elmo C. Wilson, is in the nature of an annual edition of the "March of Time." Ten chapters are devoted to a résumé of what the authors consider the significant events and trends in the United States during the year, and ten more to a similar treatment of the international scene. The book has little value for the political scientist, except possibly as a "memory jogger."

*Government, Business, and the Individual* (pp. 112), prepared by Elizabeth S. May and published by the American Association of University Women, is a syllabus, with references, for popular study of "current controversy in economic, political, and social questions."

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# RECENT PUBLICATIONS OF POLITICAL INTEREST
# BOOKS AND PERIODICALS

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INTER-AMERICAN CONFERENCE FOR THE MAINTENANCE OF PEACE.

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